89-1679

In the Supreme Court
OF THE
United States

OCTOBER TERM 1989

SUMMIT HEALTH, LTD., MIDWAY HOSPITAL MEDICAL CENTER, THE MEDICAL STAFF OF MIDWAY HOSPITAL MEDICAL CENTER, MITCHELL FELDMAN, AUGUST READER, M.D., ARTHUR N. LURVEY, M.D., JONATHAN I. MACY, M.D., JAMES J. SALZ, M.D., GILBERT PERLMAN, M.D., MARK KADZIELSKI and WEISSBURG and ARONSON, INC.,
Petitioners,

vs.

SIMON J. PINHAS, M.D.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a claim under Section 1 of the Sherman Act which fails to allege any nexus between the allegedly anticompetitive activity and interstate commerce nevertheless meets the jurisdictional requirements of the Sherman Act, as interpreted by this Court in *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980)?

2. Whether allegations that an attorney provided legal assistance to a client are sufficient to assert that the attorney and client are co-conspirators under the Sherman Act?

LIST OF PARTIES

The parties before the Court of Appeals included Simon J. Pinhas, M.D., Summit Health, Ltd., Midway Hospital Medical Center, the Medical Staff of Midway Hospital Medical Center, Mitchell Feldman, August Reader, M.D., Arthur N. Lurvey, M.D., Richard E. Posell, Jonathan I. Macy, M.D., James J. Salz, M.D., Gilbert Perlman, M.D., Peggy Farber, Mark Kadzielski and Weissburg and Aronson, Inc.[1]

[1] Summit Health, Ltd. is the parent corporation of Midway Hospital Medical Center. There are no parent or non-wholly owned subsidiaries to be listed for Summit Health, Ltd. or Weissburg and Aronson, Inc.

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Summit Health, Ltd., Midway Hospital Medical Center, the Medical Staff of Midway Hospital Medical Center, Mitchell Feldman, August Reader, M.D., Arthur N. Lurvey, M.D., Jonathan I. Macy, M.D., James J. Salz, M.D., Gilbert Perlman, M.D., Mark Kadzielski and Weissburg and Aronson, Inc., petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix, *infra*) is reported at 894 F.2d 1024 (9th Cir. 1989).

JURISDICTION

The opinion of the court of appeals issued on July 26, 1989, and was amended and superseded on January 25, 1990. Petitions for rehearing were filed by all parties, and were denied on January 25, 1990. (Appendix, *infra* at A-1.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Sherman Act § 1, 15 U.S.C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

STATEMENT OF THE CASE

In this case, a surgeon contends that a peer review action taken against his medical staff privileges at Midway Hospital Medical Center, an acute care hospital located in Los Angeles, California, was based on false charges of deficient quality of care, which were the product of an antitrust conspiracy. Although the peer review action was determined to have been based on substantial evidence by a Superior Court of the State of California ruling upon the surgeon's petition for a writ of mandate (Appendix, *infra*), the physician contends, *inter alia*, that the Hospital, its parent corporation, the physicians in-

volved in the peer review process, and the Hospital's attorneys "conspired" against him in violation of Section 1 of the Sherman Act. On October 9, 1987, the District Court entered its order granting defendants' motion to dismiss the first amended complaint without leave to amend (Appendix, *infra*).

The Ninth Circuit reversed the antitrust holding of the district court. The circuit court held that general allegations that the plaintiff and each of the defendants are "engaged in interstate commerce" are sufficient to invoke jurisdiction under Section 1 of the Sherman Act, notwithstanding the fact that the plaintiff did not allege any nexus between the alleged conspiracy and interstate commerce. The circuit court also held that the first amended complaint, which does not allege that the Hospital's attorneys did anything other than provide legal advice requested of them, was nevertheless sufficient to state a claim against the Hospital's counsel, Mr. Kadzielski and Weissburg and Aronson, Inc., for conspiring with their clients in violation of Section 1 of the Sherman Act.

REASONS FOR GRANTING REVIEW

I.

THERE IS A CLEAR CONFLICT AMONG THE JUDICIAL CIRCUITS, MANIFESTED BY THIS DECISION, AS TO THE SHERMAN ACT'S INTERSTATE COMMERCE JURISDICTIONAL REQUIREMENTS.

A. Introduction

At issue in this action is the appropriate interpretation of this Court's opinion in *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980), setting the standard

for the interstate commerce requirement for Sherman Act jurisdiction. The position adopted by the First, Second, Sixth, Seventh, Eighth, and Tenth Circuit Courts of Appeal is that the allegedly anticompetitive activity, if it is local in nature, must affect interstate commerce. The minority position, expressed by the Ninth Circuit Court of Appeals in this case, is that the allegedly anticompetitive activity need not affect interstate commerce. Instead, the minority holds that Sherman Act jurisdiction can be invoked if the general business activities of the defendants are alleged to have a not insubstantial effect on interstate commerce.

The Court should resolve this conflict because its importance to hospitals, physicians, and the public, which benefits from effective medical staff peer review, is growing as an increasing number of disciplined physicians who are the subject of peer review proceedings have been asserting Sherman Act claims against those involved in the process. As at least one circuit has recognized, the minority position would allow "virtually every physician who is ever temporarily denied hospital privileges for whatever reason [to] drag the hospital and members of its staff into costly antitrust litigation . . . ." *Seglin v. Esau*, 769 F.2d 1274, 1283-1289 (7th Cir. 1985).[2]

B. The Decision Below

Section 1 of the Sherman Act prohibits contracts, combinations or conspiracies "in restraint of trade or commerce among the several States . . . ." 15 U.S.C. § 1.

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[2] *Cf.* The Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101 ("The Congress finds . . . (4) The threat of private money damage liability under Federal laws, including treble damage liability under Federal antitrust law, unreasonably discourages physicians from participating in effective professional peer review.")

To invoke Sherman Act jurisdiction, a plaintiff must allege that "the defendants' activity is itself in interstate commerce, or, if it is local in nature, that it has an effect on some other appreciable activity demonstrably in interstate commerce." *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232, 242 (1980). The issue raised by the opinion below is whether the alleged nexus with interstate commerce must be with the general business activity of the defendants or with the alleged conspiracy in restraint of trade.

In his first amended complaint, the plaintiff asserted only in the most general terms that he "has" engaged in interstate commerce and that the defendants were "engaged in interstate commerce." (Appendix, *infra*, paragraphs 5-17 of the first amended complaint.) He failed to allege any nexus between the alleged unlawful conduct itself and interstate commerce.

The circuit court rejected the contention of petitioners that a Sherman Act plaintiff is required to allege a nexus between the alleged conspiracy and interstate commerce. Recognizing that this Court's decision in *McLain* requires a Sherman Act plaintiff to show that as a matter of practical economics the "activities" of Sherman Act defendants have a "not insubstantial effect on the interstate commerce involved," the circuit court in this case held that the "activities" in question are "the peer review process in general," and not the alleged conspiracy. 894 F.2d at 1032. The opinion in this case illustrates the Ninth Circuit's interpretation that the "activities" this Court referred to in *McLain* are the defendants' general business activities, independent of the alleged violation. *See Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094, 1097 (9th Cir.) *cert. denied*, 449 U.S. 869 (1980); *Mitchell v. Frank R. Howard Memorial*

Hospital, 853 F.2d 762 (9th Cir. 1988) *cert. denied,* 109 S.Ct. 1123 (1989). This interpretation has been roundly criticized and rejected by a majority of the Circuit Courts of Appeal.[3]

C. The Split Among The Circuits

The Ninth Circuit's interpretation of *McLain* has been criticized and rejected by a majority of circuits. The Tenth Circuit, *en banc,* evaluated *McLain* in detail and concluded that "we do not believe *McLain* signals a shift in analytical focus away from the challenged activity and towards the defendant's general or overall business. The analytical focus continues to be on the nexus, assessed in practical terms, between interstate commerce and the challenged activity." *Crane v. Intermountain Health Care, Inc.,* 637 F.2d 715, 724 (10th Cir. 1980) *(en banc).*

The Tenth Circuit's analysis of *McLain* has been accepted by the First, Second, Sixth, Seventh, and Eighth circuits. *Cordova & Simonpietri Ins. Agency v. Chase Manhattan Bank,* 649 F.2d 36, 44-45 (1st Cir. 1981); *Furlong v. Long Island College Hospital,* 710 F.2d 922, 925-926 (2nd Cir. 1983); *Hayden v. Bracy,* 744 F.2d 1338, 1342-1343 (8th Cir. 1984); *Seglin v. Esau,* 769 F.2d 1274, 1280 (7th Cir. 1985); *Stone v. William Beaumont Hospital,* 782 F.2d 609, 613-614 (6th Cir. 1986); *Doe v. St. Joseph's Hospital of Fort Wayne,* 788 F.2d 411, 417 (7th Cir. 1986); *Sarin v. Samaritan Health Center,* 813 F.2d 755, 758 (6th Cir. 1987); *see also Thompson v. Wise General Hospital,* 707 F. Supp. 849, 855 (W.D. Va. 1989) ("in the absence of any Fourth Circuit ruling on this issue, the court

[3]The minority interpretation has also been criticized by commentators. *See, e.g.,* P. Areeda, ANTITRUST LAW ¶ 232.1, at 238-239 (Supp. 1989)

adopts the approach of the majority of the circuits") *aff'd,* 896 F.2d 547 (4th Cir. 1990).[4]

Representative of such holdings, and perhaps most analogous to this case, is the decision of the Seventh Circuit in *Seglin v. Esau.* In *Seglin,* the Seventh Circuit found that the allegations of purchase of equipment and supplies in interstate commerce, the provision of services to patients who traveled in interstate commerce and the receipt of payments in interstate commerce coupled with an allegation of suspension from a medical staff for approximately sixteen months were insufficient to meet the interstate commerce pleading requirements of the Sherman Act. While the Seventh Circuit did not say that the suspension or denial of one physician's hospital privileges could never state an antitrust claim, it was "incumbent" upon the plaintiff to plead additional facts from which it could be inferred that the alleged unlawful conduct itself somehow affected interstate commerce.

Notwithstanding the complete lack of sufficient pleading allegations in the present case, the Ninth Circuit concluded that the plaintiff "need only prove that peer-review proceedings have an effect on interstate commerce, a fact that can hardly be disputed. The proceedings affect the entire staff at Midway and thus affect the hospital's interstate commerce." 894 F.2d at 1032.[5] No case so

[4]Two circuits apparently join the Ninth Circuit in the minority opinion. *See Cardio-Medical Assocs. v. Crozer-Chester Med. Ctr.,* 721 F.2d 68, 74-75 (3rd Cir. 1983); *Shahawy v. Harrison,* 778 F.2d 636, 639-640 (11th Cir. 1985) *amended,* 790 F.2d 75 (1986).

[5]This conclusion is unsupported by any factual record or pleading allegation. The plaintiff in this case did not allege that the mere existence of a peer review proceeding, as a matter of "practical economics," had a not insubstantial effect on interstate commerce. The *only* interstate commerce allegations are that the various parties

holds, and the overwhelming weight of opinion is to the contrary. *See, e.g., Sarin v. Samaritan Health Center,* 813 F.2d at 758; *Seglin v. Esau,* 769 F.2d at 1280. Moreover, whether or not peer review proceedings have an effect on interstate commerce, there is no allegation that the specific conduct alleged in this case, *i.e.,* the creation of false charges of deficient quality of care, has any nexus with interstate commerce. Accordingly, the circuit court's interstate commerce holding is inconsistent with the holdings of a majority of circuit courts of appeals.

D. The Importance of the Issue

The decision below is the most recent in the minority line of cases failing to require any nexus between the alleged anticompetitive conduct and interstate commerce. The Seventh Circuit recognized the adverse policy and practical consequences of applying the minority jurisdictional rule in a medical staff peer review case:

> Failure to uphold the dismissal of the instant complaint on the ground of lack of any allegations regarding a plausible nexus with interstate commerce would mean that virtually every physician who is ever temporarily denied hospital privileges for whatever reason could drag the hospital and members of its staff into costly antitrust litigation merely by alleging that the defendant receives payments, goods, or equipment in interstate commerce. We decline to encourage this procedure.

Seglin, 769 F.2d at 1283-1284.

It has been recognized that the minority approach "would in essence eliminate the interstate commerce test

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are or have been engaged in interstate commerce. (Appendix, *infra,* ¶¶ 5-17 of the first amended complaint.)

from antitrust law, since the total activities of virtually any defendant, no matter how local its business, are likely to have some effects upon interstate commerce. [citation]" *Stone,* 782 F.2d at 618, n. 3 (Holschuh, D. J., concurring).

The inconsistent jurisdictional findings spawned by the split among the circuits are contrary to the national purpose of the Sherman Act, which is to promote uniform antitrust treatment of interstate commerce. This purpose will not be promoted if the invocation of Sherman Act jurisdiction varies according to the precedential boundaries of circuit courts of appeal rather than uniform standards of enforcement.

II.

THE CIRCUIT COURT HOLDING IMPINGES ON THE EFFECTIVE ASSISTANCE OF COUNSEL TO THOSE CONDUCTING PEER REVIEW, AND WILL CREATE A CHILLING EFFECT ON THE PEER REVIEW PROCESS AND ITS PARTICIPANTS.

A. Introduction

This Court has not addressed the prerequisites to a finding of conspiracy between an attorney and his client. In this case, there are no allegations that the attorneys had any independent economic interest in the outcome of the peer review proceedings, or were themselves in competition with the plaintiff. The allegations consist of assertions that the lawyers acted as lawyers, providing the legal advice requested of them. This is a far cry from the allegations necessary to overcome this Court's holding that two people or entities which "are not separate economic actors pursuing separate economic interests . . . do not provide the plurality of actors imperative for a § 1 conspiracy." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984).

The circuit court in this case nevertheless held that the pleading, which alleged that the lawyers provided legal advice to their clients, was sufficient to state a claim against Mr. Kadzielski and Weissburg and Aronson, Inc., the Hospital's attorneys. If this decision is allowed to stand, it will have a devastating effect on the peer review process. The participants in any peer review process legitimately will be concerned that antitrust claims will be created solely by the fact that counsel was retained to provide assistance, even without an allegation that the

lawyers had a separate economic interest.[6] This will create a chilling effect on: (a) the retention of legal counsel, who might provide objective advice regarding the potential antitrust or tort implications of the conduct at issue; and (b) reasoned communication with legal counsel, because such communications may become targets of discovery in subsequent antitrust proceedings.

B. The Underlying Allegations

The salient Sherman Act conspiracy allegations are set forth in paragraph 124 of the first amended complaint which alleges:

> . . . in late March, 1987 [defendants] Summit Health, Midway Hospital, Medical Staff, Mr. Feldman, Dr. Reader, Dr. Lurvey, Dr. Macy, Dr. Salz and Dr. Perlman entered into a combination and a conspiracy to retaliate against Dr. Pinhas and to preclude him from continued competition in the market place . . . [i]n furtherance of the conspiracy of defendants Summit Health, Midway Hospital, Medical Staff, Mr. Feldman, Dr. Reader, Dr. Lurvey, Dr. Macy, Dr. Salz and Dr. Perlman, defendants *enlisted the assistance and received the assistance of [the hearing officer], Mr. Kadzielski and [Weissburg and Aronson]* to create unjustified charges, to secure adverse determinations against plaintiff, Dr. Pinhas, to cause a summary suspension and termination of his privi-

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[6] *Cf.* Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, in *Bolt v. Halifax*, 981 F.2d 810 (11th Cir. 1990) *petition for cert. filed*, 58 U.S.L.W. 3598 (U.S. Mar. 9, 1990) (No. 89-1419), which presents for review the question whether, in the context of state-mandated peer review, a hospital can be considered as separate from its own medical staff, for purposes of antitrust conspiracy analysis.

> leges at Midway Hospital and report that summary suspension and termination to the defendant BMQA, and causing dissemination of that adverse determination to hospitals in which Dr. Pinhas is a member, and to all hospitals to which he may apply so as to secure similar actions by those hospitals, thus effectuating a boycott of Dr. Pinhas.

First amended complaint, paragraph 124 (Appendix, *infra.*)

There is no allegation that the attorneys provided anything other than the legal assistance requested, or had any economic interest independent of that of their clients. *See Copperweld,* 467 U.S. at 769 (Section 1 conspiracy requires separate economic actors pursuing separate economic interests); *Potters Medical Center v. City Hospital Ass'n.,* 800 F.2d 568 (6th Cir. 1986) (agent without independent personal stake not capable of conspiring with hospital); *see also Weiss v. York Hospital,* 745 F.2d 786 (3rd Cir. 1984) *cert. denied,* 470 U.S. 1060 (1985). In short, there is no allegation that the role of counsel was anything other than that of a legal adviser assisting clients with their statutory obligations in the peer review process. *See Ashley Meadows Farm v. American Horse Shows Association,* 1983-2 Trade Cases ¶ 65,653, at 69353-69354 (S.D.N.Y. Sep. 29, 1983) ("Zealous" participation of counsel in disciplinary proceedings insufficient for antitrust liability.)[7]

[7]While it is recognized that the generalized allegation is made that counsel "caused" the commencement and prosecution of peer review proceedings, that allegation must be read in light of the specific factual claims asserted in the antitrust claim made by the plaintiff. Compare first amended complaint, ¶¶ 18 and 124 (Appendix, *infra*).

C. The Importance of the Issue

If the circuit court's decision is allowed to stand, it will have a devastating effect on those who would consult with counsel in the pursuit of an appropriate peer review process. Plaintiffs will make antitrust defendants of counsel who assist at any stage of the peer review process. This will create a tremendously chilling effect on the peer review process and its non-attorney participants because they will have a legitimate concern that the mere consultation with legal counsel will subject them to Sherman Act liability, and that any attorney-client communications will be discoverable in subsequent antitrust proceedings. Thus, attorneys who might otherwise counsel *against* antitrust violations may not even be consulted.

By virtue of the strong public policy favoring the ability of counsel to provide legal advice to their clients, courts should require a particularized allegation that counsel had a separate economic interest, and were separate economic actors, and find that assertions that counsel were enlisted to provide assistance are inadequate to state a viable antitrust claim.[8]

[8]The particularized pleading requirement has been recognized by the California Legislature as reflecting an important public policy. This policy is now embodied in Cal. Civ. Code § 1714.10 (West Supp. 1990) requiring preliminary court review prior to acceptance for prosecution of a pleading asserting causes of action against attorneys based on a civil conspiracy with their clients.

CONCLUSION

The circuit court's opinion will perpetuate the inconsistent interpretation of this Court's opinion in *McLain*, resulting in arbitrary and unpredictable invocation of Sherman Act jurisdiction. The circuit court's holding that an attorney and his client are co-conspirators under the Sherman Act, based solely on an allegation that an attorney provided requested legal advice, is contrary to the Sherman Act conspiracy requirements, is contrary to public policy and creates a chilling effect on the peer review process. For these reasons, petitioners request that the Court accept review and reverse the decision below.

Respectfully submitted,

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SIMON J. PINHAS, *Plaintiff-Appellant,*
v.
SUMMIT HEALTH, LTD.; MIDWAY HOSPITAL MEDICAL CENTER; THE MEDICAL STAFF OF MIDWAY HOSPITAL MEDICAL CENTER; MITCHELL FELDMAN, ET AL., *Defendants-Appellees.*
No. 87-6530.
United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Feb. 7, 1989.

Decided July 26, 1989.

As Amended on Denial of Rehearing and Rehearing En Banc Jan. 25, 1990.

Physician whose hospital staff privileges were revoked brought antitrust action. United States District Court for the Central District of California, Ferdinand F. Fernandez, J., dismissed complaint, and appeal was taken. The Court of Appeals, Wiggins, Circuit Judge, held that: (1) state action doctrine did not protect peer-review proceedings from application of antitrust laws, and (2) peer-review proceeding did not deprive physician of due process absent showing of state action.

Affirmed in part, reversed in part, and remanded.

Opinion, 880 F.2d 1108, superseded.

1. Federal Courts — 776

Dismissal for failure to state claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is ruling on question of law that Court of Appeals reviews de novo; review is limited to contents of complaint. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

2. Declaratory Judgment — 393

Customery deference for district court is not applicable to its determination to grant declaratory judgment; Court of Appeals must exercise its own sound discretion to determine propriety of district court's grant or denial of declaratory relief.

3. Monopolies — 12(15.5)

State action doctrine did not shield California hospital's peer-review proceedings from antitrust challenge absent showing that proceedings were actively supervised by state; state agencies did not actively supervise peer-review procedures and judicial review was insufficient to constitute active supervision.

4. Federal Courts — 13

Physician's antitrust suit against hospital, challenging peer-review procedure, was ripe, though peer-review proceedings were not yet completed when suit was filed, in that physician had already lost staff privileges and report of such loss had already been filed with state. West's Ann. Cal.Bus. & Prof.Code § 805.

5. Administrative Law and Procedure — 229
Monopolies — 24(1)

Physician challenging hospital peer-review process on antitrust grounds was not required to first exhaust administrative remedies; where there was no statutory requirement of exhaustion of administrative remedies, application of exhaustion doctrine lay within discretion of trial court.

6. Administrative Law and Procedure — 228
Monopolies — 28(3)

Doctrine of primary jurisdiction did not preclude review of physician's antitrust suit against hospital, though physician was currently seeking review by state of hospital's peer-review decision; proceedings at state level, designed to determine whether physician had received fair hearing, would not help clarify and narrow his antitrust claims.

7. Federal Courts — 47

Burford abstention was not appropriate in physician's antitrust suit against hospital; application of federal antitrust law did not involve difficult questions of state law.

8. Commerce — 62.14

Physician alleging that peer-review proceedings which deprived him of staff privileges violated antitrust laws sufficiently alleged required nexus with interstate commerce; hospital was engaged in interstate commerce and peer-review proceedings affected hospital's entire staff.

9. Monopolies — 12(11)

Physician alleging that hospital's denial of his staff privileges violated antitrust laws sufficiently alleged adverse effect on competition; physician alleged that he provided services to patients at lower prices, and thus his exclusion from market would injure competition by allowing other similar doctors to charge higher prices for their services.

10. Attorney and Client — 26

Attorney is not immune from antitrust liability if he becomes active participant in formulating policy decisions with his client to restrain competition.

11. Conspiracy — 18

Physician's complaint, alleging that hospital's denial of his staff privileges violated antitrust laws, sufficiently alleged antitrust conspiracy; complaint alleged that hospital and its parent corporation conspired with their attorneys and medical staff to exclude him. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

12. Constitutional Law — 296(1)
Hospitals — 6

Hospital's peer-review process did not violate physician's due process rights absent showing of state action; though peer-review process was statutorily mandated, decision to remove physician's staff privileges was made by private parties according to professional standards that were not established by state. U.S.C.A. Const. Amend. 14.

13. Declaratory Judgment — 300

Defendants in physician's antitrust suit against hospital which removed his staff privileges were not appropriate parties to defend physician's additional constitutional challenge to state and federal statutes requiring hospital to report its actions to government agencies. Health Care Quality Improvement Act of 1986, §§ 423, 425, 42 U.S.C.A. §§ 11133, 11135; West's Ann.Cal.Bus. & Prof.Code § 805.

Lawrence Silver, Beverly Hills, Cal., for plaintiff-appellant.

J. Mark Waxman, Weissburg and Aronson, Inc., Los Angeles, Cal., for defendants-appellees.

Appeal from the United States District Court for the Central District of California.

Before CANBY, WIGGINS and O'SCANNLAIN, Circuit Judges.

WIGGINS, Circuit Judge:

Appellant Dr. Simon J. Pinhas appeals the dismissal of his action challenging the removal of his staff privileges at Midway Hospital Medical Center (Midway) in Los Angeles. Pinhas alleges claims under section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1982) and 42 U.S.C. §§ 1983, 1985(3) (1982). Pinhas also seeks a declaratory judgment that Cal.Bus. & Prof.Code §§ 805, 805.5 (West Supp.1989), and the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101-11152 (Supp. IV 1986), are unconstitutional under the fourteenth amendment. The district court granted appellees' motion to dismiss all four claims. We reverse the dismissal of the antitrust claim, and affirm the dismissal of the section 1983 claim and request for declaratory judgment.[1]

I

BACKGROUND

Dr. Pinhas is an eye physician and ophthalmological surgeon. He became a member of the medical staff at Midway in October 1981. Reimbursement under Medicare

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[1]Pinhas does not challenge the dismissal of the section 1985(3) claim on appeal.

for the charges of an assistant surgeon in the performance of eye surgery became unavailable in February 1986. Pinhas alleges that most hospitals in Los Angeles subsequently eliminated their requirement that assistant surgeons be utilized during eye surgeries. Pinhas, together with several other ophthalmic surgeons at Midway, petitioned the medical staff at Midway to eliminate its assistant surgeon requirement. Thc medial staff refused to do so. Pinhas advised the hospital administration that the medical staff's refusal to eliminate the assistant surgeon requirement would cost him approximately $60,000 per year. Pinhas allegedly told the hospital that although he wished to keep the majority of his practice at Midway, he would nevertheless move his practice if the assistant surgeon requirement was not abolished. Pinhas alleges that rather than abolish the assistant surgeon requirement, Midway offered him what he characterizes as a "sham" contract in which he was to be paid the sum of $36,000 per year (later raised to $60,000 per year) for consulting services he contends he would not have been expected to perform. Pinhas refused to sign the contract. Despite repeated requests by appellees Dr. Lurvey, the Chief of Staff at Midway, and Mitchell Feldman, regional vice-president of Summit Health Ltd. (Summit), the parent corporation of Midway, Pinhas refused to return the contract.

Pinhas contends that as a result of his refusal to return the contract, Lurvey and Feldman conspired to initiate disciplinary proceedings against him. By letter dated April 13, 1987, Pinhas was advised by Summit Health and Midway, through Lurvey and Feldman, that he was summarily suspended as of that date. The letter stated that he was being suspended based on a "medical staff review of Dr. Pinhas's medical records with consideration as to the questions raised regarding: indications for surgery; ap-

propriateness of surgical procedures in light of patient's medical condition; adequacy of documentation in medical records; and ongoing pattern of identified problems." The letter also indicated that the Midway Executive Committee (MEC) would convene within ten days to review and consider the action. The MEC met on April 20, 1987, and permitted Pinhas to make a statement. The MEC upheld the summary suspension with the recommendation to terminate his staff privileges at Midway. Midway's board of directors concurred with the MEC's recommendation.

In accordance with the medical staff by-laws, Pinhas requested a hearing by the Midway Judicial Review Committee (JRC). He was granted the hearing and received notice of seven charges against him. In accordance with the bylaws, Lurvey appointed seven members of the medical staff to serve on the JRC. Attorney Richard Posell was selected by Midway's attorney Mark Kadzielski of Weissburg & Aronson to serve as the hearing officer. The peer-review hearings began on May 26 and proceeded for six hearing sessions, concluding on June 12, 1987. Both parties were permitted to call witnesses and introduce evidence. Pinhas was not permitted representation by legal counsel prior to or during the proceedings. The JRC issued its report on June 12, 1987, upholding only one of the seven charges against Pinhas. It recommended that Pinhas be reinstated subject to Pinhas's agreement to several special conditions relating to the conduct of his operations and to be placed on a six-month probationary period.

The MEC and Pinhas both appealed the JRC's decision to the Governing Board of the hospital in July 1987. On February 2, 1988, the Governing Board affirmed the decision of the JRC, but imposed more stringent conditions upon Pinhas's six-month probationary period. Fi-

nally, sometime in October 1988, Pinhas filed a petition for writ of mandate pursuant to Cal.Civ.Proc.Code § 1094.5 (West Supp.1989). No decisions has yet been reached in that matter.

On May 21, 1987, following his suspension, but before the hearing before the JRC, Pinhas filed this suit in federal court. Named as defendants are Summit Health; Midway; the Midway medical staff; Dr. Lurvey; Feldman; Drs. Reader, Macy, Salz, and Perlman, each of whom are ophthalmologists and competitors of Pinhas; Peggy Farber, an employee in the risk management section with Summit Health/Midway; Kadzielski; Weissburg & Aronson; and Posell (collectively "appellees").[2] Pinhas alleges in his complaint that as a result of his refusal to sign the "sham" contract, appellees entered into a conspiracy to preclude him from practicing at Midway or any other hospital in California or the rest of the United States in violation of section one of the Sherman Act, 15 U.S.C. § 1 (1982). The thrust of Pinhas's antitrust claim is that appellees conspired summarily to suspend and terminate his medical staff privileges at Midway, and to have the report of his termination disseminated to hospitals in California pursuant to Cal.Bus & Prof.Code §§ 805, 805.1 (West Supp.1989), and to hospitals throughout the entire country pursuant to 42 U.S.C. §§ 11133, 11135 (Supp. IV 1986) in order to preclude him from practicing elsewhere. Section 805 of the California Business and Professions Code requires a health care facility to report actions adversely affecting a doctor's clinical privileges to the California Board of Medical Quality Assurance (BMQA). Before granting or renewing a staff privilege for a physi-

[2]Also named as a defendant was the California Board of Medical Quality Assurance (BMQA). BMQA, however, was dismissed by stipulation.

cian or surgeon, a health care facility is also required under section 805.5 to request a report from BMQA to determine whether the applying doctor has been denied staff privileges by another hospital.[3] Similar reporting requirements are mandated by federal law under 42 U.S.C. §§ 11133, 11135. Pinhas contends that as a result of his termination and the dissemination of the reports, appellees have effectively boycotted his practice and precluded him from continued competition in the marketplace.

Pinhas also alleges under sections 1983 and 1985(3) that the peer-review proceedings did not comport with the due process guarantee of the fourteenth amendment. In support of his due process claim, Pinhas contends he did not receive adequate notice of the charges against him, he was not permitted legal counsel at the hearing, the hearing officer Posell was biased, he was not permitted to cross-examine the MEC's witnesses and was precluded from calling several of his own. In addition to his antitrust and civil rights claims, Pinhas requests a declaratory judgment that Cal.Bus. & Prof.Code §§ 805, 805.1 and 42 U.S.C. §§ 11133, 11135 violate the equal protection and due process clauses of the fourteenth amendment.

Appellees filed a motion to dismiss on August 4, 1987, and the court dismissed the case on September 21, 1987. The district court concluded that the appellees were protected from antitrust liability under the state action doctrine pursuant to *Patrick v. Burget*, 800 F.2d 1498 (9th Cir.1986), *rev'd*, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988). The court dismissed the civil rights

[3]Failure to file a report under section 805, or to request one under section 805.1, constitutes a misdemeanor. Cal.Bus. & Prof.Code §§ 805(e), 805.5(e).

claims because of a lack of state action under the fourteenth amendment. It dismissed the claim for declaratory relief as not ripe, and also because the appellees were not the right parties to defend either the state or federal statute. Pinhas's request for reconsideration by the court based on the filing of certiorari with the Supreme Court in *Patrick* was denied. Pinhas appeals dismissal of his antitrust and section 1983 claims, as well as his request for declaratory relief. He does not appeal the dismissal of his section 1985(3) claim. We have jurisdiction under 28 U.S.C. § 1291 (1982).

II

STANDARD OF REVIEW

[1] A dismissal for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6) is a ruling on a question of law that we review de novo. *See Fort Vancouver Plywood Co. v. United States*, 747 F.2d 547, 552 (9th Cir.1984). Review is limited to the contents of the complaint, *see id.*, and the complaint should not be dismissed under the rule "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957); *see also Gibson v. United States*, 781 F.2d 1334, 1337 (9th Cir.1986), *cert. denied*, 479 U.S. 1054, 107 S.Ct. 928, 93 L.Ed.2d 979 (1987).

[2] "The customary deference for the district court is not applicable to its determination to grant a declaratory judgment. The court of appeals must exercise its own sound discretion to determine the propriety of the district court's grant or denial of declaratory relief." *United States v. Washington*, 759 F.2d 1353, 1356-57 (9th Cir.)(en banc)(citations omitted), *cert. denied*, 474 U.S. 994, 106 S.Ct. 407, 88 L.Ed.2d 358 (1985); *accord Guerra v.*

Sutton, 783 F.2d 1371, 1376 (9th Cir.1986)(the court reviews the denial of declaratory relief de novo).

III

ANALYSIS

A. *Antitrust Claim*

Pinhas contends on appeal that the district court's dismissal of his antitrust claim based on the state action doctrine must be reversed in light of the Supreme Court's recent decision reversing our decision in *Patrick*. *Patrick v. Burget*, 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988). Appellees contend that the Supreme Court's decision in *Patrick* does not alter the district court's holding, but that even if the state action doctrine does not apply, Pinhas's amended complaint does not state a viable antitrust claim because Pinhas's claim was not ripe for determination and the complaint fails to demonstrate the required nexus with interstate commerce, plead sufficient facts to establish injury to competition, and adequately plead an antitrust conspiracy.

1. *State Action*

a. *Patrick*

In *Patrick* we considered whether the state action doctrine protected physicians in Oregon from federal antitrust liability for their involvement with hospital peer-review proceedings. The facts in *Patrick* are similar to those of this case. The plaintiff, a general and vascular surgeon, was subjected to a review of his staff privileges at a hospital in Astoria, Oregon, whereupon it was recommended that his privileges be terminated. 800 F.2d at 1502. The doctor brought suit in federal court while the hospital's peer-review proceedings were still being con-

ducted, alleging claims under sections 1 and 2 of the Sherman Act. *Id.* at 1504. He alleged that the members of his former clinic initiated the hospital peer-review proceedings to preclude him from competing against them. *Id.* at 1502-04. We held that the doctors' conduct in the peer-review proceedings was immune from antitrust scrutiny under the state action doctrine because Oregon had articluated a policy in favor of peer review and actively supervised the peer-review process. 800 F.2d at 1505-07. The Supreme Court reversed our decision, holding that the state action doctrine did not shield the hospital peer-review proceedings from an antitrust challenge. 108 S.Ct. at 1665-66.

In considering the state action doctrine, the Court applied the rigorous two-prong test first devised in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). *Patrick*, 108 S.Ct. at 1662-63. Under the *Midcal* test, " 'the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy," ' " and "the anticompetitive conduct 'must be "actively supervised" by the State itself.' " *Id.* 108 S.Ct. at 1663 (quoting *Midcal*, 445 U.S. at 105, 100 S.Ct. at 943). The Court found it unnecessary to consider the "clear articulation" prong of the *Midcal* test, finding that the second prong was not satisfied. *Id.*

The Court stated that the "active supervision" or second requirement, "mandates that the State exercise ultimate control over the challenged anticompetitive conduct," and "requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Id.* The defendants argued that the state of Oregon actively supervised the peer-review process through (1) the state Health Division; (2) the Board of Medical Examiners (BOME); (3) and the state judicial system. *Id.* The Court had little difficulty in concluding that neither the Health Division nor the BOME actively supervised the peer-review decisions. *Id.* 108 S.Ct. at 1663-64. The Health Division had general supervisory powers over such matters as licensing hospitals and the endorsement of health laws. Although the statute authorizes the Health Division to compel a hospital to meet its obligation to establish and review peer-review *procedures*, the Court concluded that this authority was insufficient because the Health Division had no power to review actual peer-review *decisions* and overturn a decision that failed to accord with state policy. *Id.* at 1664. Similarly, the BOME, whose principal function was to regulate the licensing of physicians, also lacked the authority to disapprove individual peer-review decisions. *Id.*

With respect to the state judiciary, the Court declined to decide whether judicial review of private conduct can ever satisfy the active supervision requirement. "This case, however, does not require us to decide the broad question whether judicial review of private conduct ever can constitute active supervision, because judicial review of privilege-termination decisions in Oregon, if such review exists at all, falls far short of satisfying the active supervision requirement." *Id.* at 1664-65. The Court noted that there was no statute in Oregon, or any holding by a state court, which provided a physician whose privilege had been revoked by a hospital a means of judicial review of private peer-review decisions. *Id.* at 1665. The Court emphasized that any judicial reivew that did exist was insufficient to constitute "active supervision," because the review would not involve a review of the merits of a privilege termination decision. *Id.* (citing *Straube v. Emanuel Lutheran Charity Bd.*, 287 Or. 375, 384, 600 P.2d

381, 386 (1979), *cert. denied*, 445 U.S. 966, 100 S.Ct. 1657, 64 L.Ed. 2d 242 (1980)). The Court thus concluded that no state actor in Oregon actively supervised hospital peer-review decisions and that the state action doctrine was inapplicable. *Id.*

b. *Application of Patrick*

[3] Because we conclude that the second prong of the *Midcal* test is not satisfied, we have no need to address its "clear articulation" prong. *Patrick*, 108 S.Ct. at 1663. Appellees' arguments in support of their contention that California actively supervises the peer-review process mirror those made in *Patrick*. Appellees contend that the State Department of Health Services (SDHS), California Board of Medical Quality Assurance (BMQA), and the state judiciary all actively supervise the peer-review system.

The SDHS has substantively the same role in California as the Oregon State Health Division has in Oregon: the licensure and review of hospital procedures, including procedures for the review of staff decisions.[4] Also like the Oregon State Health Division, it has no authority to review privilege decisions and therefore does not actively supervise these procedures.

Similarly, the BMQA serves relatively the same role in California as the BOME in Oregon. Its primary function is the regulation and disciplining of physicians. *See* Cal.Bus. & Prof.Code §§ 2001-2006 (West Supp.1989). And, as in Oregon, any adverse action taken by a hospital agreement against a member physician must be reported

[4] Pursuant to its rule-making authority under Cal. Health & Safety Code § 1275, the SDHS has promulgated extensive regulations governing the operation of an acute care facility. *See* Cal.Admin.Code tit. 22, § 70701 *et seq.* (1982).

to the BMQA. *See* Cal.Bus. & Prof. Code § 805 (West Supp.1989). Also like the BOME, the BMQA has no authority to review the outcome of a peer review proceeding. Although it may not disseminate a report it finds to be without merit, this restriction does not constitute the type of active supervision necessary under *Patrick*.

We join the Supreme Court in avoiding the broad question whether state courts, acting in their judicial capacity, ever can adequately supervise private conduct for purposes of the state action doctrine. *See Patrick*, 108 S.Ct. at 1664-65. The judicial review that does exist in California does not satisfy the active supervision requirement.

Unlike Oregon, California is actively engaged in reviewing peer-review decisions. Such review is created by statute under Cal.Civil Proc.Code § 1094.5 (West Supp. 1989) (reviewing quasi-judicial decisions) and Cal.Civ.Proc.Code § 1085 (West 1980) (reviewing quasi-legislative administrative proceedings).[5] The plethora of cases cited by appellees demonstrate the willingness of California courts to entertain challenges to the peer-review process. The function of the trial and appellate

[5] California law recognizes two types of mandamus review of the decisions made by hospitals with regard to physician medical staff privileges. Where a physician's medical staff privileges have been denied, suspended or terminated on the ground the physician has not demonstrated an ability to comply with established standards, that administrative decision is classified as "quasi-judicial" and review is by administrative mandamus. However, where the physician has had privileges denied or curtailed because of the implementation of a "policy" of the hospital, the administrative action is classified as "quasi-legislative" and reviewable by traditional mandamus.

Hay v. Scripps Memorial Hosp.-La Jolla, 183 Cal.App.3d 753, 758, 228 Cal.Rptr. 413, 417 (1986) (citations omitted).

courts, however, is limited under both types of proceedings.

> [Under Section 1094.5,] if the decision was substantively rational, lawful, not contrary to established public policy and the proceedings were fair, a court may not substitute a judgment for that of the governing board even if it disagrees with the board's decision. The scope of review in traditional mandamus proceedings [under section 1085] is limited to an examination of the record of the hospital proceedings to determine whether the action taken was substantively irrational, unlawful or contrary to established public policy or procedurally unfair.

Hay v. Scripps Memorial Hosp.-La Jolla, 183 Cal.App.3d 753, 758, 228 Cal.Rptr. 413, 417 (1986) (citations omitted). This limited form of review is similar to the standards applied by the Oregon courts that the Supreme Court found insufficient to constitute active supervision. *Patrick,* 108 S.Ct. at 1665. "Such constricted review does not convert the action of a private party in terminating a physician's privileges into the action of the State for purposes of the state action doctrine." *Id.*

We therefore find that the California judiciary does not actively supervise the peer-review process. Accordingly, the state action doctrine does not protect peer-review proceedings in California from application of the antitrust laws.

2. Reviewability

[4] Appellees raise several arguments in support of the contention that we should decline to review the case at this time. The argument that the case is not ripe is frivolous because Pinhas has already been removed from Midway and an "805 Report" has been filed against him.

Regardless of the outcome of the writ of mandamus action, Pinhas still has a viable antitrust claim. As is clear from the Supreme Court's decision in *Patrick,* that the peer-review proceedings were not yet complete when this suit was filed does not bar review of Pinhas's action. *See id.* at 1661 (stating that case was filed during course of peer-review proceedings).

[5] Appellees also appear to contend that Pinhas failed to exhaust his available administrative remedies. Initially, we are not convinced that the requirement of exhaustion of administrative remedies is applicable in this case because an administrative agency is not involved. The peer-review process is conducted by a private entity and is judicially reviewable in the California state courts. The reasons for giving deference to an agency, *see e.g., Morrison-Knudsen Co. v. CHG Int'l, Inc.,* 811 F.2d 1209, 1223 (9th Cir.1987), simply are not applicable here. In any event, where, as here, there is no statutory requirement of exhaustion of administrative remedies, application of the exhaustion doctrine lies within the discretion of the trial court. *See id.* The district court did not abuse its discretion by entertaining Pinhas's suit.

[6] Appellees next argue that the doctrine of primary jurisdiction precludes review of Pinhas's suit while the peer-review proceedings remain ongoing. The primary jurisdiction doctrine "is applicable whenever the enforcement of a claim subject to a specific regulatory scheme requires resolution of issues that are 'within the special competence of an administrative body.' " *Farley Transp. Co. v. Santa Fe Trail Transp. Co.,* 778 F.2d 1365, 1370 (9th Cir. 1985) (quoting *United States v. Western Pacific R.R.,* 352 U.S. 59, 64, 77 S.Ct. 161, 165, 1 L.Ed.2d 126 (1956)). Again, we doubt the application of this argument where no agency action is directly involved. Nevertheless,

the doctrine does not apply here because the proceedings at the state level, designed to determine whether Pinhas received a fair hearing, will not help clarify and narrow Pinhas's antitrust claims. *See* 6 J. Von Kalinowski, *Antitrust Laws & Trade Regulation* § 44A.01[2][b], at 44A-14 (1989) ("The doctrine of primary jurisdiction will not be invoked if it is clear that the agency's decision will have no bearing on the antitrust issues.").

[7] Abstention under *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), is also inappropriate. *Burford* abstention is appropriate when a federal court is presented with "difficult questions of state law bearing on policy problems of substantial public import 'whose importance transcends the result in the case then at bar.'" *Newberry v. Pacific Racing Ass'n*, 854 F.2d 1142, 1151 (9th Cir.1988) (quoting *Colorado River Water Conserv. Dist. v. United States*, 424 U.S. 800, 814, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976)). Application of the Sherman Act, in this case, does not involve difficult questions of state law.

Finally, appellees rely on *Mir v. Little Co.*, 844 F.2d 646 (9th Cir.1988), for the proposition that the court should abstain under principles of federalism and comity. In *Mir*, however, we concluded that a doctor's common-law claims against a hospital were precluded under California state law because the doctor had failed to succeed in his action against the hospital for a writ of mandate. *Id.* at 650-51. The holding in *Mir* is thus inapposite to Pinhas's claim under the Sherman Act.

3. Nexus with Interstate Commerce

[8] Appellees contend that Pinhas's amended complaint fails to establish jurisdiction under the Sherman Act because it does not sufficiently allege "a required

nexus with interstate commerce." Appellees' primary contention is that interstate commerce will not be affected by the removal of Pinhas from the hospital staff.[6]

In order to establish jurisdiction under the Sherman Act, a plaintiff must "identify a relevant aspect of interstate commerce and then show 'as a matter of practical economics' that the Hospital's activities have a 'not insubstantial effect on the interstate commerce involved.'" *Mitchell v. Frank R. Howard Memorial Hosp.*, 853 F.2d 762, 764 (9th Cir.1988) (summarizing this circuit's interpretation of *McLain v. Real Estate Bd.*, 444 U.S. 232, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980); quoting *Palmer v. Roosevelt Lake Log Owners Ass'n*, 651 F.2d 1289, 1291 (9th Cir. 1981)) *cert. denied* — U.S. —, 109 S.Ct. 1123, 103 L.Ed.2d 1986 (1989).

Appellees do not contend that Pinhas has failed to identify any relevant aspect of interstate commerce. Instead, their argument is directed at the second consideration, the effect on the relevant interstate commerce. Under the second requirement, Pinhas must show that "as a matter of practical economics" the activities of the appellees — the peer review process in general — have a "not insubstantial effect on the interstate commerce involved." *McLain*, 444 U.S. at 246; 100 S.Ct. at 511. Pinhas need not, as appellees apparently believe, make the more particularized showing of the effect on interstate commerce caused by the alleged conspiracy to keep him from

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[6] They argue that any medical payments received by the hospital will not be materially affected by Pinhas's removal from the staff at Midway. Appellees contend that "[a]t most, the extent of interstate commerce affected by such a removal, would be the number of out-of-state patients currently served and/or the amount of out-of-state revenues currently received by appellee for services specifically related to eye care and ophthalmic surgery." Appellant's Brief at 25.

working. *Id.* at 242-43, 100 S.Ct. at 509. He need only prove that peer-review proceedings have an effect on interstate commerce, a fact that can hardly be disputed. The proceedings affect the entire staff at Midway and thus affect the hospital's interstate commerce. Appellees' contention that Pinhas failed to allege a nexus with interstate commerce because the absence of Pinhas's services will not drastically affect the interstate commerce of Midway therefore misses the mark and must be rejected.

4. Injury to Competition

[9] Appellees argue that Pinhas's complaint was properly dismissed because it fails to allege an adverse effect on competition; appellees contend that the entire thrust of Pinhas's allegation of antitrust damages in his complaint is that his own private medical practice was injured and that unfair procedures in the administrative hearings will restrict his ability to gain income from a hospital-based practice at Midway.

To maintain a successful antitrust action, Pinhas must show that the alleged conspiracy among the appellees did more than injure him; he must prove an injury to the competition in the relevant market. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977); *Christofferson Dairy, Inc. v. MMM Sales, Inc.*, 849 F.2d 1168, 1172 (9th Cir.1988). Although the emphasis in determining whether an injury has occurred is properly on the injury to competition and not to the competitor, *see Ralph C. Wilson Indus. v. Chronicle Broadcasting Co.*, 794 F.2d 1359, 1363 (9th Cir. 1986) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962)), "injury to competitors may be probative of harm to competition," *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1040 (9th Cir.1988) *cert. granted*, — U.S. —, 109 S.Ct. 3154, 104 L.Ed.2d 1018 (1989); *accord USA Petroleum Co. v Atlantic Richfield Co.*, 859 F.2d 687, 696 (9th Cir.1988) (quoting *Hasbrouck*), *cert. granted*, — U.S. —, 109 S.Ct. 2446, 104 L.Ed.2d 1001 (1989).

Pinhas alleges in his complaint that the conspiracy was intended to boycott his attempts at providing patients with lower prices as a result of his ability to perform operations at a rate quicker than that of his competitors. Assuming Pinhas's allegation that he provides his services at a rate cheaper than that of his competitors to be true, the preclusion of Pinhas from practicing could conceivably injure competition by allowing other similar doctors to charge higher prices for their services. Or Pinhas may show that his preclusion otherwise substantially reduced total competition in the market. We therefore conclude that Pinhas has adequately pleaded injury to competition.

5. Conspiracy

Finally, appellees contend that the amended complaint fails adequately to plead an antitrust conspiracy. Section 1 of the Sherman Act is directed at prohibiting unreasonable restraint of trade effected by a "contract, combination . . . or conspiracy" among separate entities. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768, 104 S.Ct. 2731, 2740, 81 L.Ed.2d 628 (1984). "The phrase 'contract, combination, or conspiracy' limits application of the Sherman Act to concerted conduct by more than one person or single entity." *Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1449 (9th Cir.1988).

[10] Appellees contend that the dismissal of Weissburg & Aronson, and its principal, Mr. Kadzielski, should

be affirmed because they were only acting as agents of Summit Health. An attorney is not immune from antitrust liability if he becomes an active participant in formulating policy decisions with his client to restrain competition. *See Tillamook Cheese and Dairy Ass'n v. Tillamook County Creamery Ass'n,* 358 F.2d 115, 118 (9th Cir.1966); *Brown v. Donco Enter., Inc.,* 783 F.2d 644, 647 (6th Cir.1986) (per curiam). Pinhas sufficiently alleges in his complaint that Kadzielski, Weissburg & Aronson, and Posell exerted their influence over Summit Health and Midway so as to direct them to engage in the complained of acts for an anticompetitive purpose.

[11] Drs. Lurvey, Reader, Macy, Salz and Perlman are members of the medical staff at Midway. Any action taken by a medical staff satisfies the "contract, combination or conspiracy" requirement. *Weiss v. York Hosp.* 745 F.2d 786, 814-17 (1984), *cert. denied,* 470 U.S. 1060, 105 S.Ct. 1777, 84 L.Ed.2d 836 (1985).

Appellees apparently argue that Summit Health, as a parent of Midway, cannot "conspire" with Midway, and that Midway cannot "conspire" with the medical staff. *See Oltz,* 861 F.2d at 1449-50 (recognizing that a hospital and member of its medical staff may under certain circumstances constitute separate entities for purposes of adequately pleading a section 1 conspiracy); *but see Weiss,* 745 F.2d at 814-815. Pinhas alleges, however, that both entities conspired with Kadzielski, Weissburg & Aronson, and Posell, all outside agents of both Midway and Summit Health. Accordingly, Midway and Summit Health are not properly dismissed.

Finally, Feldman and Farber, as employees of Midway and/or Summit Health, cannot "conspire" with their employer corporations. *Id.* at 1450 (quoting *Copperweld,* 467 U.S. at 769, 104 S.Ct. at 2740). Again, however,

Pinhas's complaint, read in the light most favorable to him, alleges that Feldman and Farber entered into an agreement with the other appellees. We therefore find the "conspiracy" requirement of section 1 of the Sherman Act satisfied as to each of the defendants. For the foregoing reasons, we reverse the dismissal of Pinhas's antitrust claim.

B. Procedural Due Process Claim

[12] Pinhas alleges that the peer-review proceedings before the JRC violated his right to due process under the fourteenth amendment. The district court dismissed Pinhas's due process claim concluding that it did not meet the "state action" requirement.

The central inquiry in determining whether a private party's actions constitute "state action" under the fourteenth amendment is whether the party's actions may be "fairly attributable to the State". *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 937, 102 S.Ct. 2744, 2753, 73 L.Ed.2d 482 (1982). To this end, the Court has followed a two-part analysis: "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor." *Id.*

There is little doubt that the first prong under *Lugar* has been satisfied. Midway is required under California state law to include in its bylaws a mechanism by which a physician may appeal a hospital's decision to remove him from its staff. *See* Cal.Admin.Code tit. 22, § 70703(b). Additionally, the SDHS, in reviewing hospitals during the licensing process, looks to determine whether a functional, operating peer-review process is in place. The peer-

review process is thus a rule of conduct imposed by the state of California within the meaning of *Lugar*.

Under the second prong in *Lugar*, Pinhas argues that the actions of those involved in the peer-review process should be construed as that of the state because of the statutorily created system of peer-review, which Pinhas argues, actively seeks to integrate private and public systems of review. State regulation of a private entity, however, is not enough to support a finding of state action. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350, 95 S.Ct. 449, 453, 42 L.Ed.2d 477 (1974); *Blum v. Yaretsky*, 457 U.S. 991, 1004, 102 S.Ct. 2777, 2785, 73 L.Ed.2d 534 (1982). Pinhas must show that "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 351, 95 S.Ct. at 453; *see also Blum*, 457 U.S. at 1004, 102 S.Ct. at 2785. Additionally, a state may be held responsible for the action of a private party only when it "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Id.*

The challenged action here, the removal of Pinhas's staff privileges at Midway, cannot be attributed to the state of California. Only private actors were responsible for the decision to remove Pinhas. That the decision was made pursuant to a review process that has been approved by the state is of no consequence: the decision ultimately turned on the "judgments made by private parties according to professional standards that are not established by the State." *Blum*, 457 U.S. at 1008, 102 S.Ct. at 2788. Additionally, the fact that a hospital must forward to the BMQA an "805 report" whenever any

adverse action is taken against a doctor is irrelevant in determining whether the state took an active role in removing Pinhas's privileges. *See id.* at 1009-10, 102 S.Ct. at 2788 (penalties imposed for violating regulation requiring nursing home officials to conduct periodic review of type of care necessary for each resident adds nothing to claim of state action). In short, Pinhas has failed to demonstrate that the state exercised coercive power or encouraged his removal in any way.

Pinhas also attempts to characterize the appellees as state actors by arguing that the "integration of public and private systems of peer review" meets the "symbiotic relationship" test set forth in *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). Pinhas appears to argue that the state of California acts with those involved in the review proceedings as a "joint participant" in deciding whether a physician has been properly removed.

The relationship which exists between the state of California and those involved in the peer-review proceedings is far different than that which existed between the city of Wilmington and the lessee of the restaurant in the public parking garage in *Burton*. There is no financial relationship between the two, nor is any real property involved. This difference is sufficient to place this case out of the ambit of *Burton*. *See Jackson*, 419 U.S. at 357-58, 95 S.Ct. at 456-57 (limiting reach of *Burton*); *Blum*, 457 U.S. at 1010-11, 102 S.Ct. at 2789 (same).

Finally, we note that the Sixth and Seventh Circuits have also determined that a decision by a hospital to terminate or restrict the staff privileges of one of its physicians may not be attributed to the state for purpose of establishing state action under the fourteenth amendment. *See Ezpeleta v. Sisters of Mercy Health Corp.*, 800

F.2d 119, 122-23 (7th Cir.1986); *Crowder v. Conlan*, 740 F.2d 447, 451 (6th Cir. 1984). Because Pinhas's removal was instrumented solely by private parties, state action is absent and his due process claim was properly dismissed.

C. Declaratory Judgment

[13] The district court dismissed Pinhas's claim for a declaratory judgment because it was not ripe and the appellees had no interest in the enforcement of either the state or federal regulation and therefore were not the proper parties to defend the statutes.

We agree with the district court that the appellees are not the appropriate parties to defend a constitutional challenge to the relevant state and federal statutes. *See Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353, 1361 (9th Cir.1977) (dismissing claim for declaratory judgment against counties because counties' interest in the ordinance challenged was purely ministerial),[7] *affirmed in part, reversed in part*, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979).

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[7] In *Jacobson*, the plaintiffs requested a declaratory judgment to preclude the enforcement of a land use ordinance enacted by the Tahoe Regional Planning Authority (TRPA). The court dismissed the claim for declaratory judgment against several counties in the Lake Tahoe Basin:

> [T]he action against the counties was properly dismissed because the alleged infringement of constitutional rights arises from the action of the TRPA. The Compact limits the involvement of the counties to a sharing of the enforcement power with the cities, the states and the TRPA. Their involvement is purely ministerial, and thus peripheral to the allegations underlying this suit.

Jacobson, 566 F.2d at 1361.

IV

CONCLUSION

We reverse the dismissal of the antitrust claim and affirm the dismissal of the section 1983 claim and request for declaratory judgment. Each party shall bear its own costs on appeal.

AFFIRMED in part, REVERSED in part, and REMANDED

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SIMON J. PINHAS, M.D.,
Plaintiff,

v.

SUMMIT HEALTH, LTD., a corporation; MIDWAY HOSPITAL MEDICAL CENTER, a California general hospital; THE MEDICAL STAFF OF MIDWAY HOSPITAL MEDICAL CENTER, an unincorporated association; MITCHELL FELDMAN; AUGUST READER; ARTHUR N. LURVEY, RICHARD E. POSELL; JONATHAN I. MACY; JAMES J. SALZ; GILBERT PERLMAN; PEGGY FARBER; MARK KADZIELSKI; WEISSBURG and ARONSON, INC.; and STATE OF CALIFORNIA BOARD OF MEDICAL QUALITY ASSURANCE,
Defendants.

Case No. 87 03292 FFF (GHKx)

ORDER DISMISSING ACTION

FILED: October 5, 1987
ENTERED: October 9, 1987

On September 21, 1987 the Motions of defendants Summit Health, Ltd., Midway Hospital Medical Center, The Medical Staff of Midway Hospital Medical Center, Mitchell Feldman, August Reader, Arthur N. Lurvey, Richard E. Posell, Jonathan I. Macy, James J. Salz, Gilbert Perlman, Peggy Farber, Mark Kadzielski and Weissburg and Aronson, Inc. to dismiss plaintiff's Complaint and this action made pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), together with defendants' Motions for Sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure came on for hearing before Ferdinand F. Fernandez, United States District Judge, Judge Presiding. The moving parties were represented by J. Mark Waxman, Esq. of Weissburg and Aronson, Inc. Plaintiff was represented by Lawrence Silver, Esq. and Alicia G. Rosenberg, Esq.

The Court, having considered all of the pleading, files, memoranda and documents on file herein, determined to grant the Motion for Dismissal filed by moving parties, and to deny the Motion for Sanctions pursuant to Rule 11.

Accordingly, it is hereby ORDERED, ADJUDGED AND DECREED that plaintiff's Complaint against Summit Health, Ltd., Midway Hospital Medical Center, The Medical Staff of Midway Hospital Medical Center, Mitchell Feldman, August Reader, Arthur N. Lurvey, Richard E. Posell, Jonathan I. Macy, James J. Salz, Gilbert Perlman, Peggy Farber, Mark Kadzielski and Weissburg and Aronson, Inc. shall be and is hereby dismissed without leave to amend.

Dated: October 2, 1987

FERDINAND F. FERNANDEZ
United States District Judge

Presented by:

J. MARK WAXMAN, ESQ.
WEISSBURG AND ARONSON, INC.
Attorneys for Summit Health, Ltd. et al.

CASE NO. C 699 088

SUPERIOR COURT FOR THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

SIMON J. PINHAS, M.D.,
Petitioner

v.

MIDWAY HOSPITAL MEDICAL CENTER, a California corporation, AND THE MEDICAL STAFF OF MIDWAY HOSPITAL, an unincorporated association,
Respondents.

JUDGMENT DENYING PREEMPTORY WRIT OF MANDATE AND AWARDING COSTS

This matter came on regularly for hearing before the Honorable Dzintra Janavs in Department 86 of this court on April 14, 1989. Lawrence Silver, Esq. appeared as attorney for Petitioner and Weissburg and Aronson, Inc., by Kenneth M. Stern, Esq. appeared as attorneys for Respondent. The Court having reviewed all pleadings, records, evidence and papers filed herein and having heard the oral argument of counsel,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

(1) Judgment herein is entered in favor of Respondent against the Petitioner denying the Petition for Writ of Mandate;

(2) The action is hereby dismissed with prejudice;

(3) Respondent Midway Hospital Medical Center is awarded its costs in the amount of $.

Dated: May 17, 1989

DZINTRA JANAVS

Dzintra Janavs
Judge of the Superior Court

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES
DEPT. 86

Date April 20, 1989. Honorable Dzintra Janavs, Judge, C. Hudson, Deputy Clerk.

C 699 088
SIMON J. PINHAS, M.D.
vs.
MIDWAY HOSPITAL MEDICAL CENTER,
a California corporation, etc.

RULING ON SUBMITTED MATTER

On April 14, 1989, at the hearing on petitioner's motion for a peremptory writ of mandate this Court admitted into evidence by reference:

1. Transcript of hearing Vols. I-IV (5/26 — 6/12/87)

2. Transcript of hearing Vols. I-IV (10/29/87 — 1/25/88)

3. Exhibits, Vol. I

4. Petitioner's Exhibit List and Exhibits attached thereto.

5. Declaration of Lawrence Silver dated 9/19/88 attached to Trial Brief dated 9/19/88. Objections are overruled as no objection is addressed to a specific statement. Objections that the "entire declaration is filled with "conclusions, opinions and hearsay" cannot be sustained.

6. Exhibits A, B, C attached to Request to Take Judicial Notice, etc. will be judicially noticed.

After arguments, the matter was taken under submission.

The Court now rules:

Substantial judgment test is applicable herein. *Anton*, 19 Cal.3d 802, has disposed of petitioner's equal protection argument. However, even if the independent judgment test applied, this Court's ruling would be the same.

The Motion for a Writ of Mandamus is denied.

I. The findings as to Charge 1c are supported by substantial evidence. See generally Vol. I, pp. 96-118, Vol. II, pp. 277, 297-308, 299-300, 491-492, Vol. V, pp. 768-769, 947-962. Specific charts are mentioned at pp. 99-116, 108-118, 297-300, 947 et seq.

II. *Due Process Issues.*

The Court has carefully reviewed all of the transcripts and documentary evidence, including portions not relevant to charges under 1c, to determine whether petitioner's contentions of unfairness of the hearing are substantiated by the record or whether or not the hearing was fair and comported with the requirements of due process. The Court concludes that the hearing was fair and did not violate Dr. Pinhas' due process rights.

With respect to the specific issues raised by the petitioner in this regard, the Court holds as follows:

1. Failure to produce Dr. Lurvey and Dr. Feldman:

There is no indication that these witnesses were percipient witnesses as to any of the events at issue. Petitioner's offer of proof shows why their non-appearance does not violate due process and is not prejudicial. The issue here is whether or not the charge on which petitioner was found to be guilty is supported by the evidence. These witnesses' motives for signing the charges are irrelevant.

2. Witness intimidation:

The record does not show that the nurse witnesses were threatened by Ms. Farber. Rather she provided them with the kind of advice that the hospital apparently provides to all prospective witnesses who might testify in a case. The record indicates that all four witnesses did proceed to testify on Pinhas' behalf. There are no declarations by any of them that they, in fact, testified untruthfully or that they would have offered different testimony except for the "threats."

3. The burden of proof:

Petitioner contends that he was denied due process because the burden of proof was imposed on him. *Anton* disposes of petitioner's contention, this Court agreeing with respondent's interpretation of the case. See also *Gill*.

4. Petitioner's contention of unfairness because two of his competitors sat on the judicial review committee:

Presence on the committee by these individuals was in accordance with respondent's bylaws. Under the case law dealing with administrative hearings, no case holds that due process is violated in the circumstances here. Furthermore, these "competitors" ruled in Pinhas' favor on six out of seven charges, though, based on the record, a different result would not be surprising if indeed the decision makers were acting with bias.

5. Ex parte contacts, quorum, right to counsel:

The record does not show improper *ex parte* contacts tainting the proceedings. Because of the pending federal lawsuit by Dr. Pinhas, it would have been impossible to avoid some *ex parte* contacts without the Hospital hiring additional counsel. Although it would've been preferable

to avoid all *ex parte* contacts, there is no indication that petitioner's case herein was prejudiced by such contacts as did occur.

Less than a full board hearing of the JRC appeal is permissible under the bylaws, which allow a quorum of five members out of the nine. Nor was Pinhas improperly deprived of counsel. See *Anton, Gill*.

6. Hearing Officer Posell

With respect to the bias of Hearing Officer Posell, the Court's review of the transcript does not indicate that Mr. Posell was biased towards the defendants. In fact, he admonished the petitioner and petitioner's witnesses as much as the respondents'. Furthermore, Mr. Posell did not take part in the decision making and there is no indication that anything he did resulted in prejudice to the petitioner.

Copies of this Minute Order are mailed this date to:

Lawrence Silver, Esq.
A Law Corporation
9100 Wilshire Blvd., Ste. 360
Beverly Hills, CA 90212

Robert J. Gerst, Esq.
Kenneth M. Stern, Esq.
Mark A. Kadzielski, Esq.
WEISSBURG & ARONSON, INC.
32nd Fl., Two Century Plaza
2049 Century Park East
Los Angeles, CA 90067

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

SIMON J. PINHAS, M.D.,
Plaintiff,

v.

SUMMIT HEALTH, LTD., a corporation; MIDWAY HOSPITAL MEDICAL CENTER, a California general hospital; THE MEDICAL STAFF OF MIDWAY HOSPITAL MEDICAL CENTER, an unincorporated association; MITCHELL FELDMAN; AUGUST READER; ARTHUR N. LURVEY; RICHARD E. POSELL; JONATHAN I. MACY; JAMES J. SALZ; GILBERT PERLMAN; PEGGY FARBER; MARK KADZIELSKI; WEISSBURG & ARONSON; and STATE OF CALIFORNIA BOARD OF MEDICAL QUALITY ASSURANCE,
Defendants.
Case No. 87-03292 FFF (GHKx)

FIRST AMENDED COMPLAINT FOR VIOLATION OF CONSTITUTIONAL RIGHTS AND CIVIL RIGHTS (42 U.S.C. § 1983 and § 1985(3)); DECLARATORY JUDGMENT AND TREBLE DAMAGES FOR VIOLATION OF SECTION 1 OF THE SHERMAN ANTI-TRUST ACT AND INJUNCTIVE RELIEF

DEMAND FOR JURY TRIAL

STATEMENT AS TO JURISDICTION

1. This civil action arises under the Constitution of the United States and 42 U.S.C. § 1983, § 1985, and § 1988; 28 U.S.C. § 2201 and § 2202, and 15 U.S.C. § 1.

2. This court has jurisdiction of the action under 28 U.S.C. § 1331, § 1337 and § 1343, and 15 U.S.C. § 4 and § 15.

3. The matter in controversy exceeds Ten Thousand Dollars ($10,000), exclusive of interest and costs.

VENUE

4. Venue is proper pursuant to 28 U.S.C. §§ 1391 and 1392.

PARTIES

5. Plaintiff, Simon J. Pinhas, M.D., ("Dr. Pinhas") is a physician and surgeon duly licensed by the defendant, State of California, Board of Medical Quality Assurance and has limited his practice to that of eye physician and ophthalmological surgeon. Plaintiff presently, and at all times stated herein, was a Board certified surgeon, having been certified in 1982. Plaintiff has been engaged in the practice of medicine and surgery since 1977 and as such has engaged in interstate commerce. Until the grievances hereinafter complained of, plaintiff was a member, in good standing, of the defendant Medical Staff of Midway Hospital. Plaintiff is a citizen of the United States and a resident of the State of California and this judicial district.

6. Defendant Summit Health Ltd. ("Summit Health") is a corporation authorized to do business pursuant to the laws of the State of California and is the parent of Midway Hospital and Medical Center. Summit Health is engaged in interstate commerce and owns and operates approximately 19 hospitals and 49 nursing home facilities in California, Arizona, Colorado, Oregon, Iowa, Washington, Texas and Saudi Arabia.

7. Defendant Midway Hospital Medical Center ("Midway Hospital") is engaged in interstate commerce and is a general hospital organized and existing pursuant to the

laws of the State of California and conducts its business by providing medical facilities and medical care in Los Angeles, California.

8. Defendant Medical Staff of defendant Midway Hospital ("Medical Staff") is an unincorporated association of physicians engaged in interstate commerce practicing medicine at Midway Hospital with its principal place of activity located at Los Angeles, California. Defendant Medical Staff, in a conspiracy with other defendants, has wrongfully summarily suspended plaintiff and has commenced and prosecuted an unjustified, illegal and unconstitutional peer review proceeding ("Peer Review Proceeding") against plaintiff.

9. Mitchell Feldman ("Mr. Feldman") at all times mentioned herein was the regional vice-president of defendant Summit Health, a citizen of the State of California, and a resident of this judicial district, and he, along with others yet unknown to the plaintiff, has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

10. Defendant August Reader, M.D. ("Dr. Reader") is a physician and surgeon duly licensed by the defendant, State of California, Board of Medical Quality Assurance and has limited his practice to that of eye physician and ophthalmological surgeon and is competition with plaintiff Dr. Pinhas. Dr. Reader is engaged in interstate commerce and is a member of the defendant Medical Staff, a citizen of the State of California, and a resident of this judicial district, and he, along with others yet unknown to the plaintiff, has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

11. Defendant Arthur Lurvey, M.D. ("Dr. Lurvey") is a physician and surgeon duly licensed by the defendant, State of California, Board of Medical Quality Assurance and at all times mentioned herein was the Chief of Staff of Midway Hospital. Dr Lurvey is engaged in interstate commerce, is a citizen of the United States, resident of the State of California and a resident of this judicial district, and he, along with others yet unknown to the plaintiff, has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

12. Defendant Richard E. Posell ("Mr. Posell") is, and at all times herein mentioned was engaged in interstate commerce and was, an attorney at law, duly admitted and practicing law in the State of California and is a citizen of the United States, resident of the State of California and a resident of this judicial district, and has caused, directly or indirectly, the prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

13. Defendant Jonathan I. Macy, M.D. ("Dr. Macy") is a physician and surgeon duly licensed by the defendant, State of California, Board of Medical Quality Assurance and has limited his practice to that of eye physician and ophthalmological surgeon and is in competition with plaintiff Dr. Pinhas. Dr Macy is engaged in interstate commerce and is a member of the defendant Medical Staff, a citizen of the State of California, and a resident of this judicial district, and he, along with others yet unknown to the plaintiff, has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

14. Defendant James J. Salz, M.D. ("Dr. Salz") is a physician and surgeon duly licensed by the defendant, State of California, Board of Medical Quality Assurance and has limited his practice to that of eye physician and ophthalmological surgeon and is in competition with plaintiff Dr. Pinhas. Dr. Salz is engaged in interstate commerce and is a member of the defendant Medical Staff, a citizen of the State of California, and a resident of this judicial district, and he, along with others yet unknown to the plaintiff, has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

15. Defendant Gilbert Perlman, M.D. ("Dr. Perlman") is a physician and surgeon duly licensed by the defendant, State of California, Board of Medical Quality Assurance and has limited his practice to that of eye physician and ophthalmological surgeon and is in competition with plaintiff Dr. Pinhas. Dr. Perlman is engaged in interstate commerce and is a member of the defendant Medical Staff, a citizen of the State of California, and a resident of this judicial district, has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

16. Defendant Peggy Farber ("Ms. Farber") is employed by defendants Summit Heath and Midway Hospital in their Risk Management Section. At the direction of her employers and others, she was charged with (a) securing the information which was placed in the false charges brought against Dr. Pinhas and (b) interfering with Dr. Pinhas' defense against those charges at the Peer Review Proceedings. Ms. Farber is a

citizen of the State of California, and a resident of this judicial district.

17. Defendant Mark A. Kadzielski ("Mr. Kadzielski") is a principal of defendant Weissburg & Aronson Inc., and at all times herein mentioned was engaged in interstate commerce and was, an attorney at law, duly admitted and practicing law in the State of California. Mr. Kadzielski is a citizen of the State of California, and a resident of this judicial district, and has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

18. Defendant Weissburg & Aronson Inc. ("W&A") is engaged in interstate commerce and is a professional corporation engaged in the practice of law in the State of California and this judicial district, and has caused, directly or indirectly, the commencement and prosecution of the Peer Review Proceeding against plaintiff in violation of plaintiff's rights.

19. Defendant State of California, Board of Medical Quality Assurance ("BMQA") is an agency of the State of California created by and existing pursuant to Business and Professions Code, § 2000 et seq. Defendant BMQA is charged with the responsibility of enforcing, among others, Sections 805, 805.1 and 805.5 of the California Business and Profession Code as well as Section 423 et. seq. of the Health Care Quality Improvements Act of 1986, 42 U.S.C. § 11133, et. seq.

20. Relief is sought against each and all defendants, as well as their agents, assistants, successors, employees, attorneys, representatives and all persons acting in concert or in cooperation with them or at their direction.

FACTUAL ALLEGATIONS

21. From October, 1981 through the present, plaintiff Dr. Pinhas, a diplomat of the American Board of Ophthalmology, has been a member of the defendant Medical Staff. As such, he has had the right to cause the admission of his patients to defendant Midway Hospital and to use defendant Midway Hospital's facilities for the care and treatment of his patients, including, but not limited to, the facilities to perform eye surgery.

22. By reason of his training, experience and skill, Dr. Pinhas holds a national and international reputation as a specialist in corneal eye problems. He performs general eye surgery and specifically cornea transplants, cataract removal, and interocular lens replacements. Because of his training, experience and skill, Dr. Pinhas is able to perform these surgeries with a high level of success and with few, if any, complications. One of the reasons for his success is the rapidity with which he, as distinguished from his competitiors, can perform such surgeries. The speed with which such surgery can be completed benefits the patient because the exposure of cut eye tissue is drastically reduced. Some of Dr. Pinhas' competitors regularly require, on the average, six times the length of surgical time to complete the same procedures as Dr. Pinhas. Because of his reputation, skill and successes Dr. Pinhas has performed more surgeries than any other ophthalmic surgeon at Midway Hospital during the relevant time period.

23. Prior to February, 1986, the common practice in Los Angeles County was to have most eye surgeries, especially cataract extractions, performed by a primary surgeon and a second, assistant surgeon. This practice required by the defendant Medical Staff, the ("assistant

surgeon requirement"), significantly increased the cost of such eye surgeries.

24. In February 1986, the administrators of Medicare, the federal health insurance program for the elderly, determined that assistant surgeons were not necessary in connection with the performance of such eye surgeries and refused, henceforth, to provide reimbursement for the charges of any such assistant.

25. Certain ophthalmic surgeons of staff at defendant Midway Hospital, including plaintiff Dr. Pinhas, requested that the defendant Medical Staff modify its assistant surgeon requirement. Nearly all hospitals in Southern California, except defendant Midway Hospital and Cedars-Sinai (whose Medical Staff overlaps with that of defendant Midway Hospital), abolished the assistant surgeon requirement at or about the time that Medicare made its change. The request to eliminate the assistant surgeon requirement at Midway Hospital was denied and remains in effect at the time of the filing of this First Amended Complaint.

26. The consequence of the failure to make the change was that surgeons, such as the plaintiff, would have to compensate their competitors to be their assistants during surgery since Medicare would no longer compensate such assistants. Plaintiff Dr. Pinhas advised the administration of Midway Hospital that the additional costs to him of the Medical Staff's refusal to eliminate the assistant surgeon requirement would be about $60,000 per year. Dr. Pinhas, expressing a desire to keep the bulk of his practice at defendant Midway Hospital, nonetheless stated that he would move his practice if the assistant surgeon requirement was not abolished.

27. On or about January 26, 1987 defendants Summit Health and Midway Hospital, seeking to resolve the difficulty created by defendant Medical Staff's refusal to abolish the assistant surgeon requirement and Medicare's refusal to reimburse for assistant surgeons. Defendant Summit Health and Midway Hospital offered a "sham" contract to Dr. Pinhas, a true and correct copy of this "sham" contract is attached hereto and made a part hereof as Exhibit "A". The scheme provided by this "sham" contract was to "hire" Dr. Pinhas for $36,000 per year (later raised orally to $60,000 per year) to perform certain services, except, Dr. Pinhas would never be called upon to do such work. The "sham" contract was a vehicle by which defendants Summit Heath and Midway Hospital would pay Dr. Pinhas for continuing to bring patients to Midway Hospital. When the "sham" contract was explained to Dr. Pinhas, he was told that many of the members of the defendant Medical Staff had similar contracts, and that the Chief of the defendant Medical Staff, defendant Dr. Lurvey, was aware of this proposed contract and the other "sham" contracts.

28. Dr. Pinhas refused to in anyway participate in such a scheme, refused to sign the contract, and refused to return the contract, even after defendant Dr. Lurvey, acting on behalf of himself, defendant Summit Health, defendant Mr. Feldman, defendant Midway Hospital and defendant Medical Staff threatened that plaintiff's failure to do so would cause a review of his charts and possible Peer Review Proceedings. Nevertheless, defendants Summit Health and Midway Hospital made one monthly payment of $5000 to Dr. Pinhas. This payment was "hidden" in a reimbursement check to Dr. Pinhas and was promptly recorded by Dr. Pinhas as an overpayment and a credit against the amount of defendants Midway Hospital and Summit Health otherwise owed Dr. Pinhas.

29. By letter dated April 13, 1987 ("April 13, 1987 letter"), and without prior notice or an opportunity for a hearing, Dr. Pinhas was advised by defendants Summit Health and Midway Hospital, through defendants Dr. Lurvey and Mr. Feldman, that he was summarily suspended as of that immediate date. As such, Dr. Pinhas was deprived of all medical staff privileges, including the right to admit his patients and to perform surgical procedures. The April 13, 1987 letter stated that such action was the result of a "medical staff review of Dr. Pinhas' medical records, with consideration as to the questions raised regarding: indications for surgery; appropriateness of surgical procedures in light of patient's medical condition; adequacy of documentation in medical records; and ongoing pattern of identified problems." (A true and correct copy of the April 13, 1987 letter is attached hereto as Exhibit "B" and made a part hereof.)

30. By the same April 13, 1987 letter, Dr. Pinhas was advised that the Midway Hospital Medical Executive Committee ("Midway Executive Committee") would convene to review and consider the action within 10 days.

31. On April 20, 1987 the Midway Executive Committee met. After an initial meeting from which Dr. Pinhas was excluded, the Executive Committee invited him into the meeting room and requested that Dr. Pinhas make a statement. Lacking sufficient notice, unprepared, confused and without benefit of legal or fellow staff advice, he asked what the charges were, and was told that the letter of April 13, 1987 was self-explanatory. Thereafter, Dr. Pinhas attempted to reply briefly.

32. By letter dated April 20, 1987, the same date of that meeting, defendants Midway Hospital and Summit Health notified Dr. Pinhas that the Midway Executive Committee had upheld the summary suspension with the

recommendation to terminate his staff privileges at Midway Hospital. He was also informed that the Midway Hospital Board of Directors had concurred with the Midway Executive Committee's recommendation. (A true and correct copy of the April 20, 1987 letter is attached hereto as Exhibit "C" and made a part hereof.)

33. In accordance with the Midway Hospital Medical Staff Bylaws ("Bylaws", a true and correct copy of the relevant portions of which are attached hereto as Exhibit "D" and made a part hereof), Dr. Pinhas requested a hearing by the Midway Hospital Judicial Review Committee ("Judicial Review Committee") by letter dated April 30, 1987. (A true and correct copy of the April 30, 1987 letter is attached hereto as Exhibit "E" and made a part hereof.)

34. In his April 30, 1987 letter, Dr. Pinhas made certain procedural and discovery requests, including the right to be represented by retained counsel, the right to full disclosure with sufficient particularity of all charges against him, the right to an impartial hearing officer, and the right to an unbiased, unprejudiced hearing panel.

35. On May 7, 1987 Dr. Pinhas received Midway Hospital's Notice of Hearing ("May 7, 1987 Notice") from defendants Midway Hospital and Summit Health, through defendant Mr. Feldman, scheduling the Judicial Review Committee's proceedings to commence on May 12, 1987. (A true and correct copy of the May 7, 1987 Notice is attached hereto as Exhibit "F" and made a part hereof.)

36. The May 7, 1987 Notice, according to the Bylaws, is also meant to serve the function of notifying a Respondent before the Judicial Review Committee of the charges that are being made against him. Those charges as contained in the May 7, 1987 Notice were rendered in broad, general terms. The Notice listed "specific charts" that the Hospital contended would support those charges. But the charts identified were not made available to Respondent as of the date of May 7, 1987 Notice. Approximately 128 charts were identified, though some appeared to be duplicates.

37. The May 7, 1987 Notice announced the appointment, by defendant Dr. Lurvey, of the members of the Judicial Review Committee and the appointment of the Hearing Officer, defendant Mr. Posell. All of the physicians who are included as members of the Judicial Review Committee are dependent upon the defendants Midway Hospital and Summit Health for their economic livelihood and professional activities. The members of the Judicial Review Committee, members of the defendant Medical Staff, together with defendants Summit Health, Midway Hospital, Dr. Lurvey, Mr. Feldman and Mr. Posell are represented by the same counsel, defendant W&A. W&A has represented the other defendants in connection with the preparation of the false and unjustified charges brought against plaintiff Dr. Pinhas.

38. The Judicial Review Committee, over the objection of Dr. Pinhas, included physicians who were and are in direct economic and professional competition with plaintiff Dr. Pinhas: John Hofbauer, M.D. and Stephen Seiff, M.D.

39. The May 7, 1987 Notice, in a summary fashion dismissed some of Dr. Pinhas' procedural and discovery requests, and stated that the Judicial Review Committee had unanimously voted not to permit Dr. Pinhas to be represented by an attorney at law at the hearing.

40. On May 9, 1987, Dr. Pinhas filed his Objections to the Notice of Hearing ("Objections"). (A true and correct copy of Dr. Pinhas' Objections is attached hereto as Exhibit "G" and made a part hereof.)

41. In his Objections, Dr. Pinhas contended that the May 7, 1987 Notice did not provide a reasonable quantum of time in which he could prepare, present, and have decided the preliminary Motions that he believed had to be resolved — with respect to procedure and substance — prior to the hearing of his matter. Moreover, Dr. Pinhas argued that without more specific information, and without possession and sufficient review and analysis of documentary evidence, the Judicial Review Committee hearing, as established and scheduled, contravened his rights under the United States and California Constitutions, the laws of the State of California, and the contractual obligations imposed upon defendant Midway Hospital and the defendant Medical Staff to fair notice and a rational and meaningful opportunity to be heard.

42. In his Objections, Dr. Pinhas requested that the Judicial Review Committee sustain those objections and dismiss the Notice of Hearing as totally defective.

43. On May 12, 1987, the administration of defendants Midway Hospital and Summit Health did not act upon the objection, but treated it as a request for a continuance and granted Dr. Pinhas a two week continuance, rescheduling the Judicial Review Committee hearing for May 26 and 27, 1987.

44. Because the May 7, 1987 Notice of Hearing named defendant Mr. Posell as the Hearing Officer, on May 8, 1987, Dr. Pinhas, through his counsel Lawrence Silver, sent Mr. Posell a letter requesting that he respond to certain questions in order that Dr. Pinhas could determine whether to file a challenge to Mr. Posell sitting as the Hearing Officer. (A true and correct copy of the May 8, 1987 letter is attached hereto as Exhibit "H" and made a part hereof.)

45. By letter ("Posell letter") dated May 11, 1987, Mr. Posell refused to respond to Dr. Pinhas' request. (A true and correct copy of the Posell letter is attached hereto as Exhibit "I" and made a part hereof.)

46. On May 14, 1987, Dr. Pinhas, through his counsel, filed 15 Motions with respect to procedural and discovery issues, including Motions regarding his request for representation by counsel and his request that Mr. Posell respond to certain voir dire questions in order to ascertain any bias, prejudice, or interest on Mr. Posell's part. (True and correct copies of these Motions are attached hereto as Exhibit "J" and made a part hereof.)

47. On information, knowledge and belief, plaintiff alleges that defendant Mr. Posell is biased and prejudiced against he and his counsel, Lawrence Silver, and that Mr. Posell and members of the law firm of which he is a partner, Shapiro, Posell & Close, serve as hearing officers at the request of defendant W&A in cases where W&A represents the hospital. There is a unity of interest between defendants W&A and Mr. Posell. Mr. Posell and his law firm are retained and continue to be retained as counsel to the Hospital because Mr. Posell ensures that Judicial Review Committees achieve the results that W&A and the clients of W&A desire. Mr. Posell and Shapiro, Posell & Close have an economic interest in the outcome of the Peer Review Proceeding and had such an economic interest at the outset because his continued employment by defendant Summit Health, defendant Midway Hospital, defendant W&A and defendant Kadzielski depends upon his continued rulings in favor of

the defendant Midway Hospital's position and against physicians who are in the same position as Dr. Pinhas.

48. On May 18, 1987, Mr. Posell wrote to Dr. Pinhas' counsel and reiterated that the May 7, 1987 Notice advised Dr. Pinhas that the Judicial Review Committee had unanimously voted not to permit either Dr. Pinhas or the Medical Staff to be represented by an attorney at law at the hearing. Mr. Posell further stated that neither the Hearing Officer nor the Judicial Review Committee may consider Motions or requests made "in any phase of the hearing or appeal procedure by an attorney at law unless the Hearing Committee, in its discretion, permits both sides to be represented by legal counsel." Mr. Posell cited Bylaw Article VIII, Section 2(b), stating further that Dr. Pinhas' counsel's continued participation was a violation of that Bylaw. (A true and correct copy of Mr. Posell's May 18, 1987 letter is attached hereto as Exhibit "K" and made a part hereof.)

49. On May 19, 1987, Dr. Pinhas' counsel asked defendant Mr. Posell to recuse himself because of bias and prejudice and to answer three questions related to his ex parte communications with counsel for the defendant Midway Hospital, and for clarification of his ruling. (A true and correct copy of the letter to Mr. Posell dated May 19, 1987 is attached hereto as Exhibit "L" and made a part hereof.) Mr. Posell has not responded to that letter.

50. On May 19, 1987, Dr. Pinhas, appearing in propria persona, refiled the same 15 Motions respecting procedural and discovery matters, specifically including: the request to be represented by counsel; the request that the Hearing Officer respond to the voir dire questions submitted to him; the request for the full disclosure with particularity of the charges against him; and the request that Dr.

Pinhas' motions be heard and decided at a reasonable time prior to the commencement of the hearing.

51. On May 21, 1987, defendant Mr. Posell denied nearly all of the Motions filed by Dr. Pinhas. (A true and correct copy of the letter from Mr. Posell dated May 21, 1987 is attached hereto as Exhibit "M" and made a part hereof.)

52. The alleged peer review hearings concerning Dr. Pinhas commenced on May 26 and proceeded for a total of six hearing sessions which were concluded on June 12, 1987.

53. During the course of the hearings, defendants Summit Health, Midway Hospital, the Medical Staff, Mr. Posell, Mr. Kadzielski, W&A, Dr. Perlman, Mr. Feldman, Dr. Lurvey and Ms. Farber, engaged in conduct to deprive plaintiff Dr. Pinhas of a fair hearing.

54. On information, knowledge and belief, plaintiff alleges that defendants Mr. Kadzielski and W&A, directly and indirectly, had improper ex parte communications with defendant Mr. Posell.

55. On information, knowledge and belief, plaintiff alleges that defendants Mr. Kadzielski and W&A, directly and indirectly, had improper ex parte communications with members of the Judicial Review Committee.

56. On information, knowledge and belief, plaintiff alleges that defendant Dr. Perlman had improper ex parte communications with members of the Judicial Review Committee.

57. On information, knowledge and belief, plaintiff alleges that defendants Dr. Lurvey, the Medical Staff, Summit Health, Midway Hospital had improper ex parte

communications with members of the Judicial Review Committee.

58. On information, knowledge and belief, plaintiff alleges that defendant Mr. Posell had improper ex parte communications with members of the Judicial Review Committee.

59. Defendants Summit Health, Midway Hospital, Medical Staff and others sought to, and did in fact, intimidate witnesses Dr. Pinhas sought to call as witnesses in his defense of the case, including the threat of initiating Peer Review Proceedings against physicians who might testify on behalf of Dr. Pinhas.

60. Defendants Summit Health, Midway Hospital, Medical Staff, Ms. Farber and others sought to, and did in fact, intimidate witnesses Dr. Pinhas sought to call as witnesses in his defense of the case.

61. On June 1, 1987, at approximately 6:30 p.m., defendant Ms. Farber of Midway Hospital's Risk Management Section approached a table in the cafeteria where Marina Nino, Barbara Aviles, Rose Pierce and Suprani Watana, all of whom were employed by defendants Summit Health and Midway Hospital, were sitting while they were waiting to be called into the hearing regarding Dr. Pinhas' privileges. Ms. Farber said the following:

a. "I want to prepare you for what you are getting yourselves into."

b. "You don't have to do this."

c. "You can leave if you want to. You will not be persecuted or harassed if you leave."

d. "You are on your own, the hospital will not pay for your time."

e. "It is going to be like a court in there. There is a court stenographer. Everything you say will be taken down and under oath."

f. "You will each be called, one by one, you will not be allowed to go in as a group."

g. "You will be questioned in there by doctors, you will be cross-examined."

62. Shortly thereafter, Kay Deol, an administrator of defendant Midway Hospital and an employee of defendants Summit Health, Midway Hospital and Mr. Feldman, came over to the table and she and defendant Ms. Farber stayed around and hovered around the cafeteria for the rest of the evening. (True and correct copies of the declarations dated June 9, 1987 of Marina Nino and Barbara Aviles are attached hereto as Exhibit "N" and made a part hereof.)

63. Defendants Summit Health, Midway Hospital, Medical Staff, Mr. Kadzielski, W&A, Mr. Posell, Mr. Feldman, and Dr. Lurvey, precluded plaintiff Dr. Pinhas from examining two important witnesses, Mr. Feldman, the person who signed the charges against Dr. Pinhas and Dr. Lurvey, Chief of Staff who allegedly authorized the charges against Dr. Pinhas. Said defendants refused to produce Mr. Feldman and Dr. Lurvey as witnesses for cross-examination even though,

a. Mr. Feldman signed the charges,

b. Dr. Lurvey was listed in Exhibit "F", the charges, as a witness who would appear at the hearing, and

c. Dr. Pinhas and his representative repeatedly requested that they appear at the hearing and testify truthfully. (A true and correct copy of Dr. Pinhas'

request to Dr. Lurvey and Mr. Feldman to appear are attached hereto as Exhibit "O" and made a part hereof.)

64. It is custom and practice in California that during the peer review proceeding, even if the Judicial Review Committee does not permit counsel to be present at the hearing, counsel is permitted to be on the grounds of the hospital to confer with his client during appropriate breaks in the proceeding.

65. Defendant Mr. Posell issued an order ordering counsel for Dr. Pinhas, who had been listed as a witness, excluded from the Hospital grounds during any portion of the hearing, while permitting counsel for the Hospital, Mr. Kadzielski and/or associates of W&A, not only to utilize hospital facilities, but also to communicate with the prosecutor, defendant Dr. Perlman.

66. Defendant Mr. Posell acted not only as Hearing Officer but also as counsel for defendant Midway Hospital and the Medical Staff, and ruled and continued to rule, without legal or factual justification, adversely to Dr. Pinhas.

67. Defendant Mr. Posell, acting as counsel for the Medical Staff, refused to allow Dr. Pinhas to have counsel.

68. Defendant Mr. Posell made rulings during the course of the entire proceeding to frustrate and interfere with plaintiff Dr. Pinhas' ability to defend against the charges brought against him.

69. Defendant Mr. Posell ruled that Dr. Pinhas' counsel's correspondence would not be answered, and yet complied with all requests of defendants Mr. Kadzielski and W&A.

70. Defendant Mr. Posell intentionally ordered witnesses not to testify to the fact that defendant Dr. Macy and defendant Dr. Salz, who testified adversely to Dr. Pinhas at the hearing, also engaged in the same similar conduct with which Dr. Pinhas was charged. Mr. Posell precluded them from being identified by witnesses who were prepared to identify Dr. Macy and Dr. Salz to establish what the "standard in the community" was. Defendant Mr. Posell declined to permit Dr. Pinhas and his physician representative to have breaks and time to confer. In addition, Mr. Posell issued time requirements which were inherently unfair, and substantially prejudiced Dr. Pinhas. Mr. Posell, on the other hand, always considered and granted whatever requests were made by the prosecutor defendant Dr. Perlman.

71. Defendant Mr. Posell precluded testimony and evidence from being presented by Dr. Pinhas, and made hostile verbal comments to Dr. Pinhas, his physician representative and witnesses who appeared on behalf of Dr. Pinhas on and off the record made before the Judicial Review Committees.

72. Defendant Mr. Kadzielski and W&A retained, as they have done in the past, the services of Lacey Shorthand Reporting Service ("Lacey Reporters"), over whom they seek to exercise and do exercise control by reason of the substantial business they place with Lacey Reporters. Dr. Pinhas needed a copy of the transcript in order to adequately examine witnesses and prepare cross-examination. Plaintiff Dr. Pinhas, through counsel, ordered a copy of the transcript from Lacey Reporters on an expedited basis. Notwithstanding the order, defendant Mr. Kadzielski and W&A ordered Lacey Reporters not to produce the transcript. On the same day as defendant Mr. Kadzielski and W&A issued their instructions to Lacey Reporters,

counsel for Dr. Pinhas inquired how the preparation of the transcript was coming and was advised that Lacey Reporters could not produce a transcript in any timely fashion by which Dr. Pinhas could be able to use it for successive hearings. Upon information, knowledge and belief, plaintiff alleges that Lacey Reporters did so at the request of defendants Mr. Kadzielski and W&A. A day or so later Lacey Reporters agreed to produce the transcript, but not before the date that its utility for cross-examination would have passed and at a page rate of $12.00 per page.

73. Defendant Mr. Posell, after he heard from other defendants that plaintiff Dr. Pinhas, through counsel, was trying to secure a transcript, and while the hearing was pending, called Dr. Pinhas on the telephone. During that telephone conversation Mr. Posell called Dr. Pinhas a liar and threatened him by saying that Dr. Pinhas' attempts to get a copy of the transcript would cause him problems in the future.

74. On June 29, 1987 Dr. Pinhas received in the mail a document entitled "Report and Decision of the Judicial Review Committee ("Report and Decision") (a copy of the Report and Decision is attached hereto as Exhibit "P").

75. Upon information, knowledge and belief, plaintiff alleges that defendant Mr. Posell drafted the purported Report and Decision in an effort to protect defendants Summit Health, Midway Hospital, the Medical Staff, Dr. Lurvey, Mr. Feldman and himself from liability, and that such report was inconsistent with the findings and determinations of the Judicial Review Committee.

76. Although the alleged Report and Decision purports to bear the signature of the Chairman of the Judi-

cial Review Committee, Ellis Berkowitz, M.D.; it does not. Plaintiff on information knowledge and belief alleges that this alleged Report and Decision is not reflective of the determination of that tribunal. Plaintiff on information knowledge and belief alleges that this alleged Report and Decision was signed by an agent of defendants Summit Health, Midway Hospital, the Medical Staff, Mr. Feldman and Dr. Lurvey, without the authorization of each member of the Judicial Review Committee.

77. On July 6, 1987 the defendant Medical Staff appealed the decision of the Judicial Review Committee to the Governing Board of defendant Midway Hospital (a copy of the appeal of Defendant Medical Staff is attached hereto and made a part hereof as Exhibit "Q").

78. On July 7, 1987 Plaintiff Dr. Pinhas appealed the purported decision of the Judicial Review Committee to the Governing Board of the Defendant Midway Hospital (a copy of the appeal of plaintiff Dr. Pinhas is attached hereto as Exhibit "R").

FIRST CLAIM FOR RELIEF

(For Declaratory Relief Against Defendants Summit Health, Midway Hospital, Medical Staff, Mr. Feldman, Dr. Lurvey and BMQA Because They are Violating the Constitution of the United States by Enforcing and Participating in the Enforcement of Section 805 and 805.5 of the California Business and Professions Code and Section 423, et seq of the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11133)

79. Plaintiff incorporates Paragraphs 1 through 78, inclusive, above by reference as though set forth in full herein.

80. Defendants, and each of them, are estopped from denying, that the actions which the defendants have taken, and the actions which are threatened by the defendants, have been done and are being done pursuant to and under authority of the laws of the State of California and the laws of the United States.

81. Defendants, and each of them, are estopped from denying that they have acted, claim to act, and threaten to continue to act, pursuant to, under the authority of, and within the protection of:

a. Section 70703, et seq., of the California Administrative Code;

b. Section 805 of the California Business and Professions Code;

c. Section 805.5 of the California Business and Professions Code;

d. Section 805.1 of the California Business and Professions Code

e. Section 1094.5 of the California Code of Civil Procedure and the case law decided thereunder;

f. Sections 1156 and 1157 of the California Evidence Code;

g. Section 43.7 of the California Civil Code;

h. Other provisions of the laws of the State of California and the case law decided thereunder; and

i. Sections 423 et seq. of the Health Care Quality Improvements Act of 1986, 42 U.S.C. § 11133, et. seq.

82. To maintain licenses, health care facilities regularly must review privilege termination and restriction procedures to assure their conformity to applicable law.

The California Administrative Code § 70703(a) requires that the Hospital "shall have an organized medical staff responsible to the governing body for the adequacy and quality of the medical care rendered to patients in the hospital." According to Title 22, California Administrative Code, § 70701(a)(1)(F), a Hospital must have a governing body which must adopt written bylaws, in accordance with legal requirements and its community, which shall include "self-government by the medical staff with respect to the professional work performed in the hospital . . . ." The governing body shall "assure that the medical staff bylaws, rules and regulations are subject to governing body approval . . . , and these bylaws shall include an effective formal means for the medical staff, as a liaison, to participate in the development of all hospital policy." *Id.* at (8), (9).

83. When a health care facility terminates or restricts the privileges of a physician, it must promptly report to the defendant BMQA all facts and circumstances that caused the termination or restraint pursuant to Section 805 of the California Business and Professions Code, which reads as follows:

"*California Business and Professions Code §805*

The chief executive officer and the chief of the medical staff, where one exists, of any health facility licensed pursuant to Division 2 (commencing with Section 1200), or any medical, psychological, dental or podiatric professional society, or medical specialty society described in Section 43.7 of the Civil Code, or any health care service plan or medical care foundation shall report to the agency which issued the license, certificate or similar authority when any licensed physician and surgeon, psychologist, podiatrist, or dentist is denied staff privileges, removed

from the medical staff of the institution or if his or her staff or membership privileges are restricted for a cumulative total of 45 days in any calendar year for any medical disciplinary cause or reason. The reports shall be made within 20 working days following such removal or restriction, shall be certified as true and correct by the chief executive officer and the chief of the medical staff, where one exists, and shall contain a statement detailing the nature of the action, its date and all of the reasons for, and circumstances surrounding, the action. If the removal or restrictions is by resignation or other voluntary action that was requested or bargained for in lieu of medical disciplinary action, the report shall so state.

The reporting required herein shall not act as a waiver of confidentiality of medical records and committee reports. The information reported or disclosed shall be kept confidential except as provided in subdivision (c) of Section 800, provided that a copy of the report containing the information required by this section may be disclosed as required by Section 805.5 with respect to reports received on or after January 1, 1976. The Board of Medical Quality Assurance, the Board of Osteopathic Examiners, and the Board of Dental Examiners shall disclose such reports as required by Section 805.5. A file containing reports received pursuant to this section shall be maintained by the agency receiving the reports for a minimum of five years after receipt.

No person shall incur any civil or criminal liability as the result of making any report required by this section.

Failure to make a report pursuant to this section shall be a misdemeanor punishable by a fine of not

less than two hundred dollars ($200) nor more than one thousand two hundred dollars ($1,200)."

84. Pursuant to Section 805.5 of the California Business and Professions Code, hospitals are required to request from BMQA information regarding any adverse determination made pursuant to the peer review process contained in BMQA's records. The pertinent parts of Section 805.5 of the California Business and Professions Codes read as follows:

"*California Business and Professions Code § 805.5*

(a) Prior to granting or renewing staff privileges for any physician and surgeon, clinical psychologist, podiatrist, or dentist, any health facility licensed pursuant to Division 2 (commencing with Section 1200) of the Health and Safety Code, or any health care service plan or medical care foundation, or the medical staff of any such institution, shall request a report from The Board of Medical Quality Assurance, the Board of Osteopathic Examiners, or the Board of Dental Examiners to determine if any report has been made pursuant to Section 805 indicating that the applying physician and surgeon, clinical psychologist, podiatrist, or dentist has been denied staff privileges, been removed from a medical staff, or had his staff privileges restricted as provided in Section 805. The request shall include the name and California license number of the physician and surgeon, clinical psychologist, podiatrist, or dentist. Furnishing of a copy of the 805 report shall not cause the 805 report to be a public record.

(b) Upon a request made by an institution described in subdivision (a) or its medical staff, which is received on or after January 1, 1980, the board

shall furnish a copy of any report made pursuant to Section 805. However, the board shall not send a copy of a report where the denial, removal, or restriction was imposed solely because of the failure to complete medical records.

In the event that the board fails to advise such institution within 30 working days following its request for a report required by this section, the institution may grant or renew staff privileges for the physician and surgeon, clinical psychologist, podiatrist, or dentist.

(c) Any institution described in subdivision (a) or its medical staff which violates the provisions of subdivision (a) is guilty of a misdemeanor and shall be punished by a fine of not less than two hundred dollars ($200) nor more than one thousand two hundred dollars ($1,200)."

85. California Business and Professions Code § 850.1 provides that the state licensing agency, defendant BMQA, is entitled to inspect and copy statements of charges, documents, medical charts or exhibits in evidence; and any opinion findings or conclusions relating to any disciplinary proceeding resulting in an action subject to § 805 of the Business and Professions Code reporting provisions.

86. A hospital's decision terminating and restricting privileges are judicially reviewable pursuant to Section 1094.5 of the California Code of Civil Procedure. (A copy of the text of Section 1094.5 is attached hereto as Addendum "A".)

87. Peer review proceedings are confidential pursuant to California Evidence Code Sections 1156 and 1157. (A

copy of the text of Sections 1156 and 1157 are attached hereto as Addendum "B".)

88. California provides immunity to participants in the peer review process pursuant to Section 43.7 of the California Civil Code. (A copy of the text of Section 43.7 is attached hereto as Addendum "C".)

89. Defendants are estopped from denying that they have been, are presently, and will be acting under color of authority of law and the protection afforded to them provided by the laws of the State of California and of the United States. All defendants are engaged in the enforcement and execution of the laws of the State of California, and more particularly, an alleged peer review process directed to plaintiff at defendant Midway Hospital. As a result of defendants' wrongful conduct, plaintiff has been deprived of his constitutionally protected rights.

90. Defendant BMQA is the "Board of Medical Examiners" as defined by the Health Care Quality Improvement Act of 1986, Section 423, et. seq. § 11133 which provides, in pertinent part:

"Sec. 423. REPORTING OF CERTAIN PROFESSIONAL REVIEW ACTIONS TAKEN BY HEALTH CARE ENTITIES[, 42 U.S.C. § 11133].

(a) REPORTING BY HEALTH CARE ENTITIES. —

(1) ON PHYSICIANS. — Each health care entity which —

(A) takes a professional review action that adversely affects the clinical privileges of a physician for a period longer than 30 days;

* * *

(3) INFORMATION TO BE REPORTED. — The information to be reported under this subsection is —

(A) the name of the physician or practitioner involved,

(B) a description of the acts or omissions or other reasons for the action or, if known, for the surrender, and

(C) such other information respecting the circumstances of the action or surrender as the Secretary deems appropriate.

(b) REPORTING BY BOARD OF MEDICAL EXAMINERS. — Each Board of Medical Examiners shall report, in accordance with section 424, the information reported to it under subsection (a) and known instances of a health care entity's failure to report information under subsection (a)(1).

* * *

Sec. 425. DUTY OF HOSPITALS TO OBTAIN INFORMATION, [42 U.S.C. § 11135].

(a) IN GENERAL. — It is the duty of each hospital to request from the Secretary (or the agency designated under section 424(b)), on and after the date information is first required to be reported under section 424(a)) —

(1) at the time a physician or licensed health care practitioner applies to be on the medical staff (courtesy or otherwise) of, or for clinical

privileges at, the hospital, information reported under this part concerning the physician or practitioner, and

(2) once every 2 years information reported under this part concerning any physician or such practitioner who is on the medical staff (courtesy or otherwise) of, or has been granted clinical privileges at, the hospital.

A hospital may request such information at other times. Sec. 427. MISCELLANEOUS PROVISIONS[, 42 U.S.C. § 11137].

(a) PROVIDING LICENSING BOARDS AND OTHER HEALTH CARE ENTITIES WITH ACCESS TO INFORMATION. — The Secretary (or the agency designated under section 424(b)) shall, upon request, provide information reported under this part with respect to a physician or other licensed health care practitioner to State licensing boards, to hospitals, and to other health care entities (including health maintenance organizations) that have entered (or may be entering) into an employment or affiliation relationship with the physician or practitioner or to which the physician or practitioner has applied for clinical privileges or appointment to the medical staff.

* * *

(c) RELIEF FROM LIABILITY FOR REPORTING. — No person or entity shall be held liable in any civil action with respect to any report made under this part without knowledge of the falsity of the information contained in the report.

(d) INTERPRETATION OF INFORMATION. — In interpreting information reported under this

part, a payment in settlement of a medical malpractice action or claim shall not be construed as creating a presumption that medical malpractice has occurred."

91. Defendant BMQA is charged with the enforcement of the Health Care Quality Improvement Act of 1986, see Section 423, et. seq.

92. Defendant BMQA asserts that the following is required pursuant to Sections 805 of the California Business and Professions Code and pursuant to Section 423 of the Health Care Quality Improvements Act of 1986:

a. Defendant Midway Hospital, by its administrator, and defendant Dr. Lurvey, as Chief of Staff of Midway Hospital, are required pursuant to Section 805 of the California Business and Professions Code to submit a "Section 805 report" to it.

b. Defendant Midway Hospital is required, pursuant to Section 423 of the Health Care Quality Improvements Act of 1986, to make a "Section 423 report" to it.

c. Absent notice and an opportunity for hearing, the Section 805 report, or the contents thereof, shall, pursuant to Business and Professions Code Section 805.5, be distributed to (a) all health care facilities where plaintiff Dr. Pinhas has staff privileges, upon reappointment to the staff, and (b) all hospitals where Dr. Pinhas may apply for staff privileges.

d. Absent notice and an opportunity for hearing, the Section 423 report, or the contents thereof, shall, pursuant to Section 423 of the Health Care Quality Improvements Act of 1986, be distributed, within two years, to (a) all health care facilities where plaintiff Dr. Pinhas has staff privileges, upon reappointment

to the staff, and (b) all hospitals where Dr. Pinhas may apply for staff privileges.

93. Defendants Summit Health, Midway Hospital, the Medical Staff, Mr. Feldman and Dr. Lurvey have threatened to file and continue to threaten to file a Section 805 report and a Section 423 report.

94. Defendant Midway Hospital's chief executive officer and defendant Dr. Lurvey may claim immunity of the content of the filing of a Section 805 report even if that content is incorrect, misleading or malicious pursuant to Section 805 of the Business and Professions Code.

95. Defendant Midway Hospital and defendant Dr. Lurvey may claim immunity of the content of the filing of a Section 423 report even if that content is incorrect, misleading or malicious pursuant to Section 427 of the Health Care Quality Improvements Act of 1986, 42 U.S.C. § 11137(c).

96. Dr. Pinhas has no control over the wording that is contained in the Section 805 report or Section 423 report from defendant Midway Hospital and defendant Dr. Lurvey.

97. The Section 805 report and the Section 423 report was, or will be, prepared and the wording was selected within the complete discretion of defendant Midway Hospital and defendant Dr. Lurvey.

98. Defendant Midway Hospital and defendant Dr. Lurvey are not required to submit, in advance, and do not intend to submit, in advance of their filing it with BMQA, the form of Section 805 report or Section 423 report to Dr. Pinhas.

99. Defendant Midway Hospital and defendant Dr. Lurvey are not required to provide Dr. Pinhas, and will

not provide Dr. Pinhas, with a copy of the Section 805 report or the Section 423 report after it has been filed with BMQA.

100. The Section 805 report and the Section 423 report or the content there of shall be distributed to other hospitals, physicians and others pursuant to the statute, regardless of the content of the reports.

101. Any receipt of the Section 805 report or Section 423 report, the maintenance of the Section 805 report or the Section 423 report, or the distribution of the Section 805 report or the Section 423 report, is done with the funds of the State of California, is done pursuant to the authority provided by the statutes of the State of California, more particularly, the California Business and Professions Code Sections 805 and 805.5 and the Health Care Quality improvements Act of 1986. The obligation of hospitals, to secure information contained in the Section 805 report or Section 423 reports for physicians whose staff privileges are being renewed or who seek staff privileges, is compelled and criminal sanctions may apply to those who do not, pursuant to the laws of the State of California, more particularly the California Business and Professions Code Sections 805 and 805.5 and the Health Care Quality Improvements Act of 1986.

102. It is common practice in California, for every hospital who seeks appointment or reappointment of a physician to the medical staff, to require that the physician disclose whether or not they have had medical staff privileges suspended, terminated, or any action taken thereon.

103. It is common practice in California for hospitals, after the decision in *Elam v. College Park Hospital,* 132 Cal.App.3d 332, 183 Cal.Rptr. 156 (1982) to preclude

admission to the hospital staff if a physician has a report that in any way casts any doubt on his competency to practice medicine or engages in any conduct which may adversely affect patient care.

104. Plaintiff Pinhas contends and seeks the declaration of this Court that § 805 and § 805.5 of the Business and Professions Code of the State of California as interpreted and implemented by the acts of the defendants, including defendant BMQA, violates the Constitution of the United States and more particularly the 14th and 5th Amendments thereto in that Dr. Pinhas' rights to due process of law, the equal protection of the laws and his rights to privacy secured to him by the Constitution of the United States are violated.

105. Defendants contend and seek a declaration to the contrary.

106. Plaintiff Pinhas contends and seeks a declaration of this Court that Section 423 et. seq. of the Health Care Quality Improvements Act of 1986 violates the Constitution of the United States and more particularly the 5th Amendment thereto in that Dr. Pinhas' rights to due process of law, the equal protection of the laws and his rights to privacy secured to him by the Constitution of the United States are violated.

107. Defendants contend and seek a declaration to the contrary.

108. It is necessary and appropriate that this dispute between plaintiff Dr. Pinhas and defendants be adjudicated and determined promptly, so that the parties to this litigation may know their rights and obligations under the laws and Constitution of the United States and because failure to determine this dispute will result in irreparable injury to Dr. Pinhas.

SECOND CLAIM FOR RELIEF

(For Damages for Violations of Plaintiff's Constitutional Rights and the Civil Rights Act, 42 U.S.C. § 1983 by Defendants Summit Health, Midway Hospital, Medical Staff, Mr. Feldman, Dr. Reader, Dr. Lurvey, Mr. Posell, Dr. Macy, Dr. Salz, Dr. Perlman, Ms. Farber, Mr. Kadzielski, W&A, and Each of Them)

109. Plaintiff incorporates Paragraphs 1 through 78 and 80 through 103, inclusive, above by reference as though set forth in full herein.

110. Dr. Pinhas has been summarily, knowlingly, and intentionally deprived of the status and his property interest in membership on Midway Hospital's medical staff, including admitting and surgical privileges at Midway Hospital, without prior notice or an opportunity to be heard.

111. By virtue of the unjustified and unlawful Peer Review Proceeding which has been commenced and is continuing to be prosecuted against Dr. Pinhas, defendants and each of them have been, are presently, and will be acting under the color of authority and law of the State of California and of the United States. Defendants and each of them claim that they are engaged in the enforcement and execution of the laws of the State of California and the peer review process. Under such circumstances, Dr. Pinhas is entitled to due process rights under the United States Constitution.

112. Defendants, and each of them, by denying Dr. Pinhas representation by counsel, full disclosure with particularity of the charges against Dr. Pinhas and by refusing to take action on plaintiff's request that Dr. Pinhas' Motions be heard and decided at a reasonable time prior to the commencement of the hearing, are acting

in contravention of procedures required by due process. Further, defendants and each of them, by denying plaintiff his right to an unbiased, unprejudiced, detached hearing officer, and by appointing the Judicial Review Committee that consists of members who are in active economic and professional competition with plaintiff and of defendant's own medical staff and subject to the control, persuasion and undue influence of defendants, is further depriving defendant of a fair opportunity to be heard as guaranteed to him by the due process and equal protection clauses of the Constitution of the United States. Further, improper ex parte communications between counsel for the Medical Staff, the hearing officer, the Judicial Review Committee members, the prosecutor, and officers of the Hospital deny plaintiff a fair hearing consistent with due process. Further, defendants' intimidation of witnesses, depriving witnesses of the plaintiff from attending the hearing, threatening plaintiff's counsel with arrest and ordering him off Hospital grounds during the hearing — even though he was listed as a witness, ordering witnesses not to testify to facts helpful to plaintiff Dr. Pinhas, vilifying plaintiff, his physician representative, his witnesses, and interfering with plaintiff's ability to timely get a copy of the transcript of proceedings deprive plaintiff of due process of law.

113. Based on the conduct of defendants, and each of them, as set forth above, Dr. Pinhas has been deprived of his rights in violation of the 5th and the 14th Amendments and Due Process and Equal Protection Clauses of the United States Constitution together with his constitutional right to privacy and has been and will continue to suffer damages in an amount to be determined at the trial of this matter, but in excess of the jurisdictional limits of this Court.

114. As a result of the conduct of defendants and each of them, plaintiff is entitled to reasonable attorneys fees, pursuant to 42 U.S.C. § 1988.

THIRD CLAIM FOR RELIEF

(For Damages for Violations of the Constitution of the United States and the Civil Rights Act 42 U.S.C. § 1985(3) by Defendants Summit Health, Midway Hospital, Medical Staff, Mr. Feldman, Dr. Reader, Dr. Lurvey, Mr. Posell, Dr. Macy, Dr. Salz, Dr. Perlman, Ms. Farber, Mr. Kadzielski, W&A, and Each of Them)

115. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 78, 80 through 103 and 110 inclusive, of this First Amended Complaint.

116. Defendants, and each of them, have conspired to deprive plaintiff of equal protection under the laws and of equal privileges and immunities under the laws. In furtherance of this conspiracy, defendants, and each of them, have denied Dr. Pinhas representation by counsel, full disclosure with particularity of the charges against Dr. Pinhas and denied plaintiff's request that Dr. Pinhas' Motions be heard and decided at a reasonable time prior to the commencement of the hearing, and have acted in contravention of procedures required by due process. Further, defendants and each of them, have denied plaintiff his right to an unbiased, unprejudiced, detached hearing officer, and by appointing the Judicial Review Committee that consists of members who are in active economic and professional competition with plaintiff and of defendant's own medical staff and subject to the control, persuasion and undue influence of defendants, has further deprived defendant of a fair opportunity to be heard as guaranteed to him by the due process and equal protection clauses of the Constitution of the United

States. Further, improper ex parte communications between counsel for the Medical Staff, the hearing officer, the Judicial Review Committee members, the prosecutor, and officers of the Hospital have denied plaintiff a fair hearing consistent with due process. Further, defendants' intimidation of witnesses, depriving witnesses of the plaintiff from attending the hearing, threatening plaintiff's counsel with arrest and ordering him off Hospital grounds during the hearing — even though he was listed as a witness, ordering witnesses not to testify to facts helpful to plaintiff Dr. Pinhas, vilifying plaintiff, his physician representative, his witnesses on and off the record before the Judicial Review Committee, and interfering with plaintiff's ability to timely get a copy of the transcript of proceedings has deprived plaintiff of due process of law.

117. As a result of the conduct of defendants, and each of them, plaintiff has suffered property damage to his medical practice, and has suffered the deprivation of his property interest in membership on the Midway Hospital's medical staff, including admitting and surgical privileges, at Midway Hospital. As a consequence, plaintiff has been deprived of his rights in violation of the 5th and 14th Amendments and Due Process and Equal Protections Clauses of the United States Constitution together with the constitutionally protected right of privacy.

118. As a result of the conduct of defendants, and each of them, plaintiff has been damaged in an amount to be determined at the time of trial, but in an amount in excess of the jurisdictional limits of this Court.

119. As a result of the conduct of defendants, and each of them, plaintiff is entitled to reasonable attorneys fees, pursuant to 42 U.S.C. § 1988 of the Civil Rights Act.

FOURTH CLAIM FOR RELIEF

(Treble Damages for Violation of the Sherman Anti-Trust Act, Section 1, 15 U.S.C. § 1 by defendants Summit Health, Midway Hospital, the Medical Staff, Mr. Feldman, Dr. Reader, Dr. Lurvey, Dr. Macy, Dr. Salz, Dr. Perlman, Mr. Kadzielski, W&A and Each of Them)

120. Plaintiff realleges and incorporates herein by reference paragraphs 1 through 78, 80, 84, 90, 91, 93 through 103, and 112, inclusive, of the First Amended Complaint.

121. Defendants Dr. Reader, Dr. Macy, Dr. Salz, Dr. Perlman, and others are engaged in the practice of medicine limited to eye medicine and ophthalmologic surgery and are in competition with plaintiff Dr. Pinhas.

122. Defendants are seeking to effectuate a boycott and drive Dr. Pinhas out of business so that other ophthalmologists and eye physicians, including, but not limited to, defendants Dr. Reader, Dr. Macy, Dr. Salz and Dr. Perlman, will have a greater share of the eye care and ophthalmic surgery in Los Angeles.

123. In an effort to effectuate the boycott and to boycott plaintiff Dr. Pinhas, defendants Dr. Reader, Dr. Macy, Dr. Salz, Dr. Perlman, and others, including, but not limited to, Dr. Lurvey have sought to control and do control defendant Medical Staff. Defendant Mr. Feldman controls Summit Health insofar as it relates to Dr. Pinhas and Midway Hospital.

124. After Dr. Pinhas refused to accept the terms and conditions of the "sham" contract and refused to return a copy of it to Midway Hospital, and after defendant Dr. Lurvey threatened that proceedings may be instituted against him in the event that he sought to utilize this Exhibit "A" in any way detrimental to Midway Hospital, in late March, 1987 Summit Health, Midway Hospital,

Medical Staff, Mr. Feldman, Dr. Reader, Dr. Lurvey, Dr. Macy, Dr. Salz, and Dr. Perlman entered into a combination and conspiracy to retaliate against Dr. Pinhas and to preclude him from continued competition in the market place, not only at defendant Midway Hospital, but by reason of the filing of an improper Section 805 report and a Section 423 report, preclude plaintiff Pinhas from practicing medicine in California, if not the United States. In furtherance of the conspiracy of defendants Summit Health, Midway Hospital, Medical Staff, Mr. Feldman, Dr. Reader, Dr. Lurvey, Dr. Macy, Dr. Salz, and Dr. Pearlman, defendants enlisted the assistance and received the assistance of Mr. Posell, Mr. Kadzielski, and W&A to create unjustified charges, to secure adverse determinations against plaintiff Dr. Pinhas, to cause a summary suspension and termination of his privileges at Midway Hospital and report that summary suspension and termination to the defendant BMQA, and causing dissemination of that adverse determination to all hospitals which Dr. Pinhas is a member, and to all hospitals to which he may apply so as to secure similar actions by those hospitals, thus effectuating a boycott of Dr. Pinhas.

125. Without admission to other hospitals, plaintiff Pinhas has no method by which he can practice ophthalmic surgery, which constitutes the greater portion of his practice.

126. The actions undertaken by defendants in connection with the bringing of false charges against Dr. Pinhas were done with oppression and malice and:

a. Were not done in a reasonable belief that the action was in furtherance of the quality of health care;

b. Were not done after a reasonable effort to obtain the facts of the matter;

c. Were not done after adequate notice and hearing procedures afforded to Dr. Pinhas, and utilized procedures which were not fair under the circumstances; and

d. Were not based upon the reasonable belief that the action was warranted by the facts after defendants' efforts to obtain facts.

FIFTH CLAIM FOR RELIEF
(Injunctive Relief Against All Defendants)

127. Plaintiff realleges and incorporates herein by reference all of the allegations of this First Amended Complaint.

128. Defendants, and each of them, threatened to, and unless restrained will, continue to deprive plaintiff Dr. Pinhas of his right to due process and fair procedure under both the United States Constitution and the Constitution of the State of California.

129. Defendants' conduct has caused, and will continue to cause, plaintiff great and irreparable injury, including, but not limited to, the injury which resulted in the filing of a California Business and Professions Code Section 805.5 notice for which pecuniary damages would not afford adequate relief, in that they would not completely compensate plaintiff's professional reputation and good standing, and would be extremely difficult to ascertain.

WHEREFORE, plaintiff requests judgment to be entered for plaintiff and against defendants, and each of them, as follows:

1. On the First Claim for Relief, for a declaratory judgment that Sections 805 and 805.5 of the California Business and Professions Code and Section 423 et seq of the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11133 et seq., are unconstitutional, together with costs of suit incurred herein, including reasonable attorneys fees pursuant to 42 U.S.C. § 1988, and for such other and further relief as the Court deems just and proper.

2. On the Second Claim for Relief, for damages according to proof, for costs of suit incurred herein, including reasonable attorneys fees pursuant to 42 U.S.C. § 1988, and for such other and further relief as the Court deems just and proper.

3. On the Third Claim for Relief, for damages according to proof, for costs of suit incurred herein, including reasonable attorneys fees pursuant to 42 U.S.C. § 1988, and for such other and further relief as the Court deems just and proper.

4. On the Fourth Claim for Relief, for damages according to proof and then trebled, and for costs of suit incurred herein, including reasonable attorneys fees as allowed by law, and for such other and further relief as the Court deems just and proper.

5. On all Claims for Relief an injunction, preliminary, and final, against each and all defendants, their agents, assistants, successors, employees, attorneys, representatives, and all persons acting in concert or cooperation with them or at their direction from violating the right of plaintiff.

JURY TRIAL DEMAND

1. Plaintiff hereby demands trial by jury herein.

DATED: July 13, 1987

LAWRENCE SILVER
A Law Corporation

By: LAWRENCE SILVER
Attorneys for Plaintiff
Simon J. Pinhas, M.D.

[Exhibits Omitted]

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.:

I am a citizen of the United States and a resident of or employed in the City of Los Angeles, County of Los Angeles; I am over the age of 18 years and not a party to the within action; my business address is 1706 Maple Avenue, Los Angeles, California 90015.

On April 24, 1990, I served the within Petition For a Writ of Certiorari in Re: "Summit Health, Ltd., Midway Hospital Medical Center, The Medical Staff of Midway Hospital Medical Staff, Mitchell Feldman, August Reader, M.D., Arthur N. Lurvey, M.D., Johnathan I. Macy, M.D., James J. Salz, M.D., Gilbert Perlman, M.D., Mark Kadzielski and Weissburg and Aronson, Inc., Petitioners vs. Simon J. Pinhas, M.D., Respondent," in the United States Supreme Court, October Term 1989, No.
on all parties interested in said action, by placing three copies thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States Post Office mail box at Los Angeles, California, addressed as follows:

Lawrence Silver, Esq.
A Law Corporation
10920 Wilshire Blvd.
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Attorneys for Respondent
Simon J. Pinhas, M.D.

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 24, 1990, at Los Angeles, California

Chuck Albrecht

CHUCK ALBRECHT